Before the
Copyright Office
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Washington, D.C.

In the matter of **1998 and 1999** **Cable Royalty** **Distribution Proceedings**	**Docket No. 2001-8 CARP CD 1998-99**

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

OF THE

CANADIAN CLAIMANTS GROUP

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ORIGINAL

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The Canadian Claimants Group ("CCG") submits these proposed findings of facts and conclusions of law in support of its request for an award of 2.25073% of the 1998 and 2.47694% of the 1999 Basic Cable Royalty Funds, and 0.17301% of the 1998 and 0.42946% of the 1999 3.75% Royalty Funds.[1]

Pursuant to 17 U.S.C. 111 (d)(3)(A), the CCG asserts a claim on behalf of non-U.S. programming on Canadian stations distantly retransmitted by U.S. cable systems. The CCG does not assert, and the above percentages do not include, a claim for programming on Canadian stations that is claimed by the Joint Sports Claimants or the Program Suppliers group.

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[1] The requested percentages already account for an award to the Music Claimants of 2.33% and the settlements with NPR and the Devotional Claimants. CCG does not seek a share of the Syndex Royalties.

I. INTRODUCTION AND SUMMARY OF CASE

A. The 1990-1992 Proceeding Established a Baseline Award for CCG

In the last litigated cable distribution proceeding, Distribution of 1990, 1991 and 1992 Cable Royalties, 61 Fed. Reg. 55653 (Oct. 28, 1996) ("1990-1992 Proceeding"), the CCG was awarded 0.955% of the Basic Funds and 0.18718% of the 3.75 Funds (after adjustment for settlements with the Music Claimants and NPR). These awards were equal to 51% and 56%, respectively, of the Basic and 3.75 Rate royalties paid by cable systems for the carriage of distant Canadian stations. 1990-1992 Proceeding, 61 Fed. Reg. at 55663-4. The remainder of the royalties paid for the retransmission of Canadian stations was awarded to the Joint Sports Claimants and Program Suppliers in accordance with the results of the 1990-1994 cable operator survey presented by the CCG. 1990-1992 Proceeding, 61 Fed. Reg. at 55663.

B. Circumstances Changed From 1990-1992 to 1998-1999

There has been large scale upheaval in the cable compulsory licensing market during the years 1998 and 1999 that has resulted in a dramatic change in the amount of royalties paid and in types of signals carried. The resulting changed circumstances by themselves warrant a doubling of the award to the CCG to reflect the diminution in the carriage of all other types of programming. Additional changed circumstances specific to the CCG's claim warrant a further, modest increase to their award.[2]

2 The Copyright Royalty Tribunal first adopted the "changed circumstances" criteria for the distribution of the 1980 cable copyright royalties. 1980 Cable Royalty Distribution Determination, 48 Fed. Reg. 9552, 9564 (March 7, 1983), aff'd National Association of Broadcasters v. Copyright Royalty Tribunal, 777 F.2d 922, 932 (D.C. Cir. 1985) (appropriate to utilize "changed circumstances" standard so long as not the sole standard).

1. Canadian Distant Royalty Payments Held Constant While Overall Distant Royalties Decreased

Many changes have occurred in the cable compulsory license marketplace since the 1990-1992 Proceeding. The most dramatic change, affecting all claimants, was the conversion of WTBS from a distantly retransmitted superstation to a cable network. WTBS was the most widely carried distant signal, and its removal from the distant signal marketplace has caused dramatic changes in the royalty funds. The Basic and 3.75 Funds decreased sharply beginning in 1998 while the number of cable systems that do not retransmit any distant signals have increased dramatically. At the same time, however, the actual dollar amount of royalties paid for the distant retransmission of Canadian signals has remained constant.

This combination of factors–the decrease in the number of cable systems that retransmit distant signals, along with the constancy in the amount of royalties paid for distant retransmission of Canadian signals–has had a clear and direct effect: The royalties paid by cable systems for the right to carry Canadian distant signals account for a significantly larger percentage of the Basic and 3.75 Funds. CCG witness David Bennett presented evidence based on Cable Data Corporation data showing that Canadian signals generated about twice the percentage of distant royalties in 1998 and 1999 as in 1992. Mr. Bennett also rebutted the express and implied contentions that the allocation of Basic royalties cannot be done with precision because of the sliding scale fee schedule for Basic royalties. Thus, the change in the nature of the Royalty fund represents a changed circumstance that justifies a proportionate upward adjustment in the Canadian award.

2. More Subscribers had Access to Canadian Signals

Not only did the percentage of royalties generated by Canadian signals increase, but Canadian signals also saw an absolute growth in the number of subscribers with access to distant Canadian signals. Canadian carriage as measured by subscribers increased more than 28% from 1990-1992 while the number of subscribers for network, educational, and independent signals collectively decreased 45%. Further the relative percentage of subscribers receiving Canadian distant signals more than doubled, rising from 1.55% in 1990-1992 to 3.56% in 1998 and 3.62% in 1999. This broader reach of Canadian signals on American cable systems is a strong indication that despite tremendous upheaval and change in the industry, cable operators continue to find value in the unique programming available on Canadian signals, and further justifies an increase in the Canadian award.

3. Cable Operators Retransmitted A Substantially Greater Amount Of Canadian Content

Mr. Bennett also presented evidence that Canadian content on Canadian distant signals has increased substantially since the 1990-1992 Proceeding. After weighting the data to properly reflect the nature of the content actually retransmitted in the U.S., CCG members are responsible for 80% of the programming on Canadian distant signals, up from 70% in the 1990-1992 period. Canadian programming also increased as a portion of the mix of all programming retransmitted on a distant basis by cable systems. Between 1992 and the 1998-1999 period, Canadian programming grew from 1% to 3.68% of all programming aired on television stations that were carried as distant signals. Relative to other programming categories, this represents a 268% increase in the amount of Canadian programming that was actually available to Form 3 cable subscribers.

C. Cable Operators Retransmit Canadian Signals Because They Continue to Value Canadian Programming

The testimony and exhibits of Janice de Freitas, Lucy Medeiros, and Andrea L. Wood all demonstrated the unique nature of Canadian programming, its appeal in U.S. markets, and the quality and diversity of such programming on Canadian signals retransmitted in the United States.

This testimony is consistent with the substantial value placed on Canadian distant signals by cable operators. Dr. Debra Ringold sponsored a double blind, constant sum survey of cable operators who carried distant Canadian signals during the years 1996 through 1999. The survey asked operators to give their opinions of the relative value of the different programming types shown on Canadian signals. The survey shows that cable operators assigned Canadian programming an average value of 61% over the four-year period.

D. There is No Other Reliable Evidence in the Record That Reflects the Relative Value of Canadian Programming

John E. Calfee, Ph.D., Resident Scholar at the American Enterprise Institute, submitted a written report that concludes that neither the Bortz survey nor the Rosston regression model provide a reasonable way to deal with the difficult problem of assessing market valuation for a niche market segment, such as Canadian programming. Dr. Calfee opined that the proportion of all fees paid for importing Canadian signals offers a superior starting point for allocating these fees to programming types. In his opinion, the history of cable systems' selection of distant signal subscriptions indicates that actual royalty payments remain a valid basis for allocating royalty payments.

Dr. Calfee's conclusions are further buttressed by the testimony of the proponents of the Bortz survey as well as the testimony of Dr. William Fairley. In the 1990-1992 Proceeding, Paul Bortz was clear in stating that the Bortz survey could not accurately measure small groups whose share of the total funds where only few percentage points. In this Proceeding, James Trautman's survey report made the same point with regard to the CCG claim. Dr. Fairley also testified that the Bortz sample size was so small as to not provide any conclusive results.

E. Changed Circumstances and the CCG's Evidence Regarding the Relative Value of Canadian Programming Warrant an Increased Award to the CCG

In summary, the CCG is seeking an award that is directly tied to the royalties paid for the carriage of distant Canadian signals. The CCG requests that they receive an award that is the midpoint between the results of Dr. Ringold's Canadian Survey and Mr. Bennett's weighted Canadian Content analysis. The CCG requests an award at this midpoint, because unlike Mr. Bennett's carriage and Canadian content analysis, Dr. Ringold's Survey is not weighted to reflect which cable systems paid greater amounts of royalties or had larger numbers of royalties subscribers. Accordingly, the CCG requests an award equal to 70% of the Basic and 3.75 royalties generated by the distant carriage of Canadian signals.[3]

The CCG requests the following awards, which take into account awards to, and settlements with, all other parties: 2.25073% of the 1998 and 2.47694% of the 1999 Basic Cable Royalty Funds, and 0.17301% of the 1998 and 0.42946% of the 1999 3.75% Royalty Funds.

3 As discussed in Section III.E, *infra*, as part of its Basic Fund award, the CCG also seeks a proportionate share of the Minimum Fee royalties paid by Form 3 cable systems that did not retransmit any distant signals.

II. PROPOSED FINDINGS OF FACT

A. Summary of Central Proposed Findings

1. Since the last litigated cable royalty distribution proceeding, the 1990-1992 Proceeding, the total royalty pool has decreased by almost half. Although this reduction resulted, in small part, from changes in the regulatory environment, the primary cause of the reduction was that U.S. cable systems no longer carried commercial television stations such as WTBS and WWOR as distant signals. Canadian programming was not carried on these signals. Therefore, removal of these signals from the distant signal royalty pool increased the value of Canadian programming relative to the value of the programming that was carried on such dropped signals. (*See* Prop. Find. § II.C.2, *infra.*)

2. Despite the overall drop in royalties, the actual dollar amount of royalties paid for the carriage of distant Canadian signals has held more or less steady since the last proceeding and, in fact, has nearly doubled as a percentage of overall royalties. (*See* Prop. Find. § II.C.3, *infra.*)

3. Since 1990-1992, the number of U.S. cable subscribers who have access to Canadian programming on Canadian distant signals has *increased* by more than 25% while the total number of distant subscriber instances has *decreased* by 45%. On a relative basis, the share of distant subscriber instances attributable to Canadian signals has increased 268% in this same period. (*See* Prop. Find. § II.C.5, *infra.*)

4. Cable operators are able to select from an array of Canadian signals carrying varying amounts of Canadian content. These operators predominantly select those Canadian signals containing the greatest percentage of Canadian content. Since 1990-1992, the weighted percentage of Canadian content on Canadian signals retransmitted in the United States has increased from approximately 70% to approximately 80%. (*See* Prop. Find. §§ II.B.2 and II.D, *infra.*)

5. The average broadcasting day of retransmitted Canadian stations in 1998 and 1999 was longer than it was in 1990-1992. (*See* Prop. Find. § II.B.3, *infra.*)

6. The quality, diversity and appeal of Canadian programming have remained constant since 1990-1992. (*See* Prop. Find. § II.B.3, *infra.*)

7. The results of the latest survey of U.S. cable systems retransmitting Canadian signals show that cable operators continue to value Canadian content more than any other content on Canadian signals and that the valuation of Canadian content has held steady with prior years, maintaining a long term average of 61%. (*See* Prop. Find. § II.E, *infra.*)

8. Adopting the Canadian methodology would not harm any of the other parties. Instead, it would ensure that only those claimant groups with programming on distant Canadian signals (CCG, Joint Sports Claimants and Program Suppliers) would share the royalties paid for those signals. (*See* Prop. Find. § II.I, *infra.*)

9. The CCG is the only party to this proceeding that has presented reliable and accurate evidence of the value of Canadian programming on retransmitted distant signals. (*See* Prop. Find. § II.F, *infra.*)

10. CCG should be awarded the following percentages of the three royalty funds, (which take into account an award to Music Claimants and the settlements with National Public Radio and the Devotional Claimants):

Summary of CCG Claim			
Year	**Basic Royalty Fund**	**3.75 Fee Fund**	**Syndex Fund**
1998	2.25073%	0.17301%	0.0%
1999	2.47694%	0.42946%	0.0%

(*See* Appendices B-E, discussed *infra* and incorporated by reference.)

B. The CCG's Claim Encompasses a Broad Variety of High-Quality Programming Broadcast on Canadian Signals in 1998-1999 That Held Significant Appeal to U.S. Cable Operators

1. CCG Members Are Copyright Owners Whose Works Were Carried On Distant Signals Retransmitted By U.S. Cable Systems in 1998 And 1999

11. CCG is a continuously changing ad hoc claimant group that had nearly 100 member companies during the 1998 to 1999 period, including public and private broadcasters in Canada as well as Canadian program suppliers. (Written Direct Testimony of Janice de Freitas ("de Freitas Dir.") at 2; Exhibit CDN-1-A; Transcript of Oral Testimony of Janice de Freitas ("de Freitas Tr.") at 5129, 5180.)

12. CCG's Phase I claim encompasses all non-U.S. claimed programming shown on Canadian television signals that were distantly retransmitted in the U.S. during 1998 and 1999 by U.S. cable systems. (de Freitas Dir. at 2.)

13. Programming from Canadian stations that are distantly retransmitted has a limited reach in the U.S. because of restrictions on distant carriage imposed under 17 U.S.C. § 111(c)(4)(A). (de Freitas Dir. at 3; Exhibit CDN-1-C.)

14. Canadian stations may only be retransmitted within a compulsory licensing zone ("Compulsory Zone"), an area that is approximately the northern quarter of the United States, as defined in 17 U.S.C. § 101 (c)(4)(A). U.S. cable systems south of the Compulsory Zone may not retransmit Canadian stations under the compulsory licensing scheme. (de Freitas Dir. at 3, de Freitas Tr. at 5139-5142.)

2. Canadian Distant Signals Consist Primarily Of Programming Owned By CCG Members

15. The programs on Canadian signals belong to only three Phase I claimants: CCG, the Program Suppliers, and the Joint Sports Claimants. This makes the Canadian claim different from that brought by the Public Television Claimants. The Public Television Group has generally been treated as asserting a Phase I claim for all of the programming broadcast on the educational stations that are retransmitted as distant signals. (de Freitas Dir. at 2; Written Direct Testimony of David Bennett ("Bennett Dir.") at 6; Exhibit CDN-4-C.)

16. U.S. programming content on Canadian distant signals consists of a small percentage of Joint Sports Programming and a larger percentage of non-sports U.S. programming attributable to Program Suppliers. Of the latter, much of the programming is simulcast and not compensable to Program Suppliers. (Transcript of Oral Testimony of David Bennett ("Bennett Tr.") at 5303-06, 5310-14; de Freitas Tr. at 5159-60; Exhibit CDN-4-C.)

17. As shown by the programming schedules, most of the programming shown on Canadian distant signals is Canadian in origin. (de Freitas Dir. at 5; de Freitas Tr. at 5166, 5177; Exhibit CDN-1-J.) In fact, based on data collected from the Canadian Radio-Television, and Telecommunications Commission ("CRTC"), an average of 65% of the content on any given Canadian signal is non-U.S. programming claimed by CCG members. Signal by signal, the Canadian content runs from a high of 91% for CBET to a low of 45% for CIVT. The CRTC data is an accurate depiction of what is broadcast because Canadian broadcasters provide the data as a condition of licensure. (Bennett Tr. at 5302-05, 5436-37; Exhibits CDN-4-C & CDN-4-D.)

18. When the content is weighted by total fees or by subscribers, approximately 80% of the content retransmitted in the U.S. is attributable to CCG members. The purpose of the weighting is to factor into the analysis the actual carriage of the signal by U.S. cable

systems. Weighting portrays a fair picture of what is actually being retransmitted because the content on signals that are widely carried by cable systems is appropriately given more importance than that of signals that are more sparsely carried by cable systems. The fee-weighted percentage of Canadian content on the Canadian distant signals is 79.42% for 1998 and 80.91% for 1999. The average two-year, fee-weighted measure of Canadian content on Canadian distant signals is 80.165%. (Bennett Dir. at 6-7; Bennett Tr. at 5318-19; Exhibit CDN-4-D.)

19. Compared to the Canadian content analysis undertaken for the 1990-1992 proceedings, weighted Canadian content is roughly 9% higher in 1998 and 1999. This increase in Canadian content is largely attributable to the CBC's decision to "Canadianize" its signals (i.e., reduce the amount of American-produced programming in its broadcast schedule). In sum, approximately 80% of the overall content on Canadian signals is properly attributed to CCG. (Bennett Dir. at 7; Bennett Tr. at 5322-23, 5316; de Freitas Tr. at 5170, 5209.)

3. Canadian Programming on Canadian Distant Signals Provides Diverse and Distinctive Programming Which Fills a Unique Niche in the Channel Line-up Offered by U.S. Cable Systems Along the Canadian Border

20. In 1998 and 1999, distantly retransmitted Canadian stations showed every type of programming found in this proceeding, including network and local programs, sports programs, entertainment programs, children's programming and news and public affairs programs. These types of programming often have a distinctly Canadian slant or flavor. (de Freitas Dir. at 2; Written Direct Testimony of Lucy Medeiros ("Medeiros Dir.") at 2; Written Direct Testimony of Andrea L. Wood ("Wood Dir.") at 2-3; de Freitas Tr. at 5154-5174; Transcript of Oral Testimony of Andrea L. Wood ("Wood Tr.") at 5080, 5097-5103, 5107-08; Transcript of Oral Testimony of Lucy Medeiros ("Medeiros Tr.") at 5228-5238; Bennett Tr. at 5371- 73; Exhibits CDN-1-A, CDN-1-E, CDN-1-H; CDN-3-A.)

21. As noted above, the average broadcasting day of retransmitted Canadian stations during 1998-1999 was longer than the average broadcasting day in 1990-1992. (Bennett Tr. at 5149-50, 5153; compare Exhibit CDN-4-C with 1990-1992 CCG Exhibit CDN-6-A.)

22. The popularity of Canadian programs in the U.S. is demonstrated by the ability of Canadian program suppliers to license their products into the U.S. television market. In fact, the quality and appeal of Canadian programming allows Canadian program suppliers to license their programming throughout the world. (de Freitas Tr. at 5149-50, 5153, 5156; Wood Tr. at 5079-80, 5084-85, 5093-95; Medeiros Tr. at 5227, 5232; Exhibit CDN-1-F; CDN-2-C; CDN-3-B.)

23. The success of Canadian program suppliers in licensing their products in the U.S. comes despite the harm Canadian program suppliers experience from retransmission by U.S. cable systems. The retransmission of Canadian signals by U.S. cable systems harms Canadian program suppliers by compromising their ability to license their products on an exclusive basis in the U.S. or Canada. (Medeiros Tr. at 5247.)

24. The quality and subject matter of Canadian programming appeals to American audiences whether the program has distinctly Canadian themes or is more generically North American. (Wood Tr. at 5080, 5103, 5107-08; Medeiros Tr. at 5227-28, 5236, 5257-58; de Freitas Tr. 5175.)

25. Canadian programming has also received numerous awards, underscoring its high quality. (de Freitas Dir. at 4; Medeiros Dir. at 3; Wood Dir. at 3; de Freitas Tr. at 5153-54; Medeiros Tr. at 5227, 5231-33; Exhibits CDN-1-G; CDN-2-B.) Cable operators value award-winning programming. (Transcript of Oral Testimony of John Wilson ("Wilson Tr.") at 3021.)

26. The Canadian Broadcasting Corporation's ("CBC") English-language television network offers a unique programming alternative to U.S. viewers. In 1998 and 1999, the English television network was composed of 14 owned and operated stations and 19

affiliate stations located across Canada. CBC offers original distinctive drama programs that it produces, co-produces, develops or licenses. CBC news programs offer different viewpoints of American and world affairs. It also informs viewers of events in Canada that are of interest to many Americans, particularly those living along the Canadian border, where such signals are retransmitted. CBC also offers sports programs not ordinarily available on conventional television in the U.S. (de Freitas Dir. at 4-5; de Freitas Tr. at 5126-27, 5156-59, 5167-77, 5180, 5182-83; Exhibits CDN-1-H, CDN-1-I, CDN-1-J, CDN-1-L).

27. CBC's children's programming is distinctive for its commercial-free nature and non-violent content. Cable operators and parents value these attributes in children's programming. (de Freitas Dir. at 5; de Freitas Tr. at 5159, 5169, 5192-96; Medeiros Tr. 5233; Transcript of Oral Testimony of Arthur Gruen ("Gruen Tr.") at 8012-14; Transcript of Oral Testimony of Judith Allen ("Allen Tr.") at 6111, 6115; Wilson Tr. at 3050-51; Transcript of Oral Testimony of Michael Egan ("Egan Tr.") at 1310-11; Exhibits CDN-1-H, CDN-1-J, CDN-1-L.)

28. CBC offers a greater array of art and cultural programming such as ballet, operas, operettas, etc., than U.S. commercial television. Cable operators value this type of programming because it adds diversity to their channel lineup. (de Freitas Tr. at 5159, 5193-04; Allen Tr. at 6110-14; Wilson Tr. at 3018, 3242-43; Egan Tr. at 1310; Transcript of Oral Testimony of Marcellus Alexander ("Alexander Tr.") at 2264.)

29. CBC is known for its exceptional coverage of the Olympics. In 1998, CBC provided unique, continuous live coverage of the Nagano Olympics. CBC's own broadcast crews in Canada and Japan brought live reports to CBC viewers, providing coverage that was broader and more comprehensive than that of the competing U.S. network, which broadcast on tape delay, hours after the events occurred. It has been well established in the these proceedings, that coverage of unique, live sporting events such as the Olympics has a value to cable operators greatly in excess of the mere broadcast time. (de Freitas Dir. at 4,

de Freitas Tr. at 5162-66; Egan Tr. at 1420-21; Transcript of Oral Testimony of June Travis ("Travis Tr.") at 1488.)

30. U.S. cable system operators also distantly retransmitted signals from Canada's French-language public television network, Radio-Canada. In 1998 and 1999, Radio-Canada was composed of eight owned and operated stations and five affiliate stations located across Canada. Radio-Canada operates entirely in French and broadcasts a wide variety of entertainment, arts, sports and news and public affairs programming. (de Freitas Dir. at 6; de Freitas Tr. at 5127-28, 5180-81; Exhibit CDN-1-I; Exhibit CDN-1-K; *see also* 1990-1992 CCG Exhibit 6-G.)

31. French-language Canadian stations are distantly retransmitted in areas of the U.S. - such as New York, Vermont, Maine, New Hampshire and Massachusetts - that have a significant proportion of residents with French-Canadian ancestry. (de Freitas Dir. at 3; de Freitas Tr. at 5146-48; Exhibit CDN-1-C, CDN-1-D.)

32. Cable system operators paid approximately $300,000 each accounting period in 1998 and 1999 just to retransmit French-language Canadian stations. (de Freitas Tr. at 5131; Exhibit CDN-1-B.)

C. Historical Allocation Methods Governing This Proceeding Are Affected By Changed Circumstances

1. Cable Operators Pay For Distant Signals Under an Elaborate Compulsory Licensing Scheme

33. U.S. cable system operators must pay cable royalties and file a Statement of Account ("SOA") document twice a year. By completing a SOA, each cable system can calculate the royalties that it owes and document the distant signal carriage data upon which the calculation is based. (Written Direct Testimony of Marsha Kessler ("Kessler Dir.") at 5-6; Exhibits PS 98-99 5, PS 98-99 6.)

34. Cable Data Corporation ("CDC") is a company that compiles the information reported by cable operators in their SOAs and reproduces the data in electronic format. CDC is the only company that does this work and all parties in this proceeding rely on CDC for the SOA data. (Kessler Dir. at 10.)

35. The carriage data focuses on Form 3 cable systems carrying signals for three reasons: (1) the fundamental purpose of requiring payment of royalty fees is to compensate copyright owners for retransmission of broadcast signals beyond their local broadcast areas (i.e. distant retransmission); (2) Form 3 systems are the only systems that report carriage information with enough detail to allow a determination of which types of signals and programming are responsible for generating the royalties; and (3) Form 3 systems pay over 95% of the royalties each accounting period. (Bennett Dir. at 2; Bennett Tr. at 5275; Transcript of Oral Direct Testimony of Marsha Kessler ("Kessler Tr.") at 6381-87, 6554.)

36. When a cable system in the same geographic area as a TV station retransmits a signal, that signal is referred to as "local." When a cable system retransmits a signal that originates in another geographic area, that signal is referred to as "distant." (Kessler Dir. at 4-5.)

37. Program owners license their shows to TV stations for broadcast within a certain geographic area. When a cable system retransmits the station to distant cable subscribers located outside the station's local broadcast market, the programs become available to an audience for which the program owner has not been compensated. It is the purpose of section 111 to compensate the program owners for the increased exposure of their works beyond the area in which it was originally licensed. (Kessler Dir. at 4.)

38. Cable systems pay royalties based on their size. The smallest systems, those with gross receipts of $75,800 or less for each six-month period, pay a flat fee of $28 every six months for the right to carry distant signals, regardless of how many signals they carry.

These smallest systems are referred to as "Form 1" systems within the context of these proceedings. (Kessler Dir. at 9; Exhibit PS 98-99 5.)

39. Mid-size systems, those with gross receipts of between $75,800 and $292,000, pay royalties of 0.5% of the first $146,000 in Gross Receipts for each six month period and 1.0% of Gross Receipts above $146,000. These mid-size systems are referred to as "Form 2" systems. (Kessler Dir. at 9; Exhibit PS 98-99 5.)

40. The largest systems, those with Gross Receipts of $292,000 or more, are referred to as "Form 3" systems. Form 3 systems are about 22% of all U.S. cable systems but pay over 95% of all royalties. Royalties from Form 3 systems are broken into four categories: Minimum Fee, Basic Fee, 3.75 Fee and Syndex Fee. (Kessler Dir. at 9-11; Exhibit PS 98-99 5.)

41. Under the royalty scheme, distant signals are assigned a value called a Distant Signal Equivalent ("DSE"). Form 3 cable systems are required to pay a Minimum Fee equal to the cost of retransmitting a distant signal as the first full DSE on the Basic Royalty fee payment scale. Independent signals, which include Canadian and Mexican signals, have a value of 1 DSE. Educational and Network signals have a value of 0.25 DSEs. (Written Rebuttal Testimony of David Bennett ("Bennett Reb.") at 1; Kessler Tr. at 6388, 6519-20; Exhibit PS 98-99 6.)

42. A system must pay the Minimum Fee if it is carrying less than one DSE worth of distant signals. For example, if, on a distant basis, a Form 3 system carries just one Educational (assigned 0.250 DSE under the compulsory licensing scheme) and one Network signal (also 0.250 DSE), the system has a total of 0.500 DSEs of distant signals. Nevertheless, it must pay the Minimum Fee as if it were carrying a full DSE of distant signals. (Bennett Dir. at 2-3; Bennett Tr. at 5271.)

43. Under 17 U.S.C. § 111(d)(1)(B)(i) the Minimum Fee is "to be applied against the fee, if any, payable pursuant to paragraphs (ii) through (iv)." Subparagraphs (ii) through

(iv) establish the Basic Royalty fee. The Code of Federal Regulations clarifies this language to indicate that the both the Basic Fee and the 3.75 Rate fee are applied against the Minimum Fee. Thus, the fee is the minimum the system must pay but, if the system carries one or more full DSEs worth of distant signals, the Minimum Fee is applied against whatever is due as Basic Royalty or 3.75 Rate fees. (Bennett Dir. at 2; 37 CFR part 265.2; 63 Fed. Reg. 39738 at 39739 (July 24, 1998).)

44. Basic Royalties are calculated as a percentage of each cable system's Gross Receipts. The cumulative percentage increases as the cable system carries more distant signals, although the marginal cost for each signal decreases. Under the sliding scale, the cable system must pay 0.893% of Gross Receipts for the first DSE, 0.563% for the second, third and fourth DSEs, and 0.265% percent for additional DSEs. (Bennett Dir. at 3; Kessler Dir. at 13-17; Exhibit PS 98-99 6.)

45. The 3.75 Fee is paid by cable systems for signals that are deemed "non-permitted" because the system could not have carried the signal prior to June 24, 1981, the date on which the Federal Communications Commission eliminated its rules limiting the number of distant signals that cable systems were permitted to retransmit. A cable operator pays 3.75% of its Gross Receipts for each signal that it identifies as non-permitted under those rules. (Kessler Dir. at 17-18; Exhibit PS 98-99 6 at p. 11.)

46. Finally, Form 3 cable system operators located in the top 100 markets may also be liable for Syndex fees to compensate the copyright owners of programs subject to syndicated exclusivity rules. (Kessler Dir. at 18, Exhibit PS 98-99 6 at 10.)

47. In prior cable royalty distribution proceedings, the Copyright Royalty Tribunal (CRT) and the 1990-1992 CARP focused on the allocation of Basic Royalties, 3.75 Fee Royalties and Syndex Royalties. Each claimant was allocated a percentage of each of these three types of royalties. Other royalties, such as the Minimum Fees paid by Form 3 systems, as well as all Form 2 and Form 1 royalties, were distributed by the Copyright Office using the allocation percentages awarded for the Basic Royalty fund. This approach

was well-grounded because the statutory payment scheme for Minimum Fees, Form 2 fees and Form 1 fees provided no basis for attributing the fees to the carriage of any particular distant signal and thus presented no basis for allocation. (Bennett Dir. at 1-2.)

48. CCG has used CDC data to introduce evidence showing the breakdown of royalties by fee and signal type. That data is summarized for the 1998-1999 period in the tables attached as Appendix A and incorporated herein by reference.[4] (Bennett Dir. at 4-6; Bennett Reb. at 6-7, 9-10; Exhibits CDN-4-B and CDN-R-1-E.)

2. The Conversion of WTBS and the Dramatic Rise in Minimum Fee Payments Mark a Significant Change Since 1990-1992

49. Under the statutory scheme set up by Congress, the Minimum Fee is paid by cable systems for the general right to retransmit distant broadcast signals, but is not tied to the carriage of specific signals. As a result, the Minimum Fee presents no information that can be used to allocate royalties. In contrast, the Basic, 3.75 Fee and Syndex Royalties are directly tied to the carriage of identifiable distant signals and have been used consistently in the past by the claimant groups, the CRT, the 1990-1992 CARP, and the Librarian of Congress to allocate funds. Once that allocation is decided, the Copyright Office's practice of distributing other royalty revenues in accordance with the Basic Royalty allocation will result in an equitable and proportionate distribution of Minimum Fee royalties. (Bennett Dir. at 2.)

50. In 1992-2, the fees paid by systems with no distant carriage amounted to $180,411, or 0.198% of total cable fund revenue. In 1998, the Minimum Fees became a much more significant component of the cable royalty fund. According to CDC, by 1999-2, the fees paid by systems with no distant carriage had surged to over $11 million dollars, or more than 21% of total revenues. (Bennett Dir. at 3; Exhibit CDN-4-A.)

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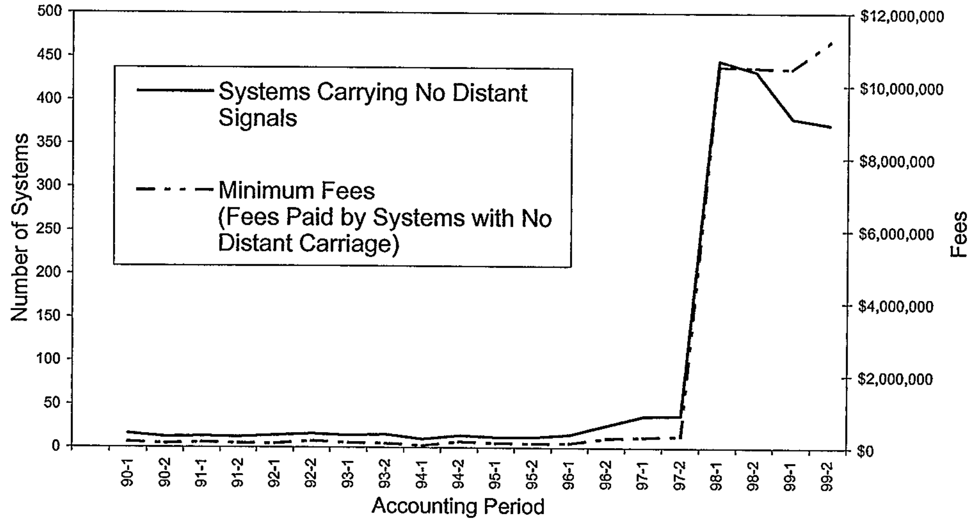
[4] Because of the way CDC data is presented, Basic Fees are calculated in the appendix as the "All Fees Except Minimum Fees" less 3.75 Rate Fees and Syndex Fees. (Bennett Tr. at 5280-81.)

51. This change in payment of Minimum Fees is due in large part to WTBS's transition from a broadcast signal to a cable channel in 1998. Generally, this transition resulted in substantial reductions in royalty payments because almost every Form 3 cable system had carried WTBS on a distant basis. In addition to the overall reduction in fees, dropping WTBS left many systems with no distant signals, resulting in a sharp increase in the payment of the Minimum Fee, as shown in the chart below. The net effect was to make the Minimum Fee a very important percentage of the royalties.



(Bennett Dir. at 3; Written Direct Testimony of Richard V. Ducey ("Ducey Dir.") at 8-9; Exhibit CDN-4-A.)

52. The vast majority of Minimum Fees are paid by systems carrying no distant signals. There are many situations, however, where a Minimum Fee is paid by Form 3 Systems that carry *between* 0.000 and 1.000 DSEs of distant signals. In those cases, CDC allocates the entire Minimum Fee (equal to the Basic Royalty rate for one full DSE) pro rata as Basic Royalties among the distant signals carried rather than just allocating the amount that would have been paid for the carriage if there were no Minimum Fee. For example, if a cable system carries one network signal (0.250 DSE) and one educational signal (0.250 DSE) on a distant basis (for a total of 0.500 DSEs) and pays $10,000 in Minimum Fees, CDC's reports would show half of the money, $5,000, allocated to each

signal as Basic Royalties. If there were no Minimum Fee, the cable system would presumably only have paid $2,500 for each signal. Under the statute, only a portion of the Minimum Fee ($2,500 per signal) can be allocated against the Basic Royalty. CDC's treatment of the Minimum Fees results in a higher dollar value appearing as part of the Total Distant Fees and Basic Royalties reported by CDC for the two signal types. Because they are based on CDC's standard reports, the data in Exhibit CDN-4-D show Total Distant Fees and Basic Royalties for educational and network signals that are substantially inflated by CDC's handling of these Minimum Fees. (Bennett Dir. at 3; Bennett Tr. at 5277-78.)

53. CDC was able to provide a breakdown of royalties paid by U.S. Form 3 cable systems on a signal-by-signal basis. The data that CDC provided also recalculated the royalties as if there were no Minimum Fee, in the manner presented by Jonda Martin in her testimony on behalf of Program Suppliers. The royalty data indicates that during each accounting period of 1998-1999, an average of over $1 million of Minimum Fee payments were reported as Total Distant Fees (and therefore Basic Royalties) by CDC for systems with *between zero and one DSE.* Of this money, CDC allocated over $600,000 of the Minimum Fee to educational signals and over $400,000 to network signals. The somewhat arbitrary mechanics of CDC's Minimum Fee allocation system is the primary reason that educational and network signals appeared to have a sudden and substantial increase in royalties starting in 1998 even though, during the years since 1992, the number of subscribers remained steady for educational signals and declined for independent signals. (Bennett Dir. at 3-4; Bennett Reb. at 9-10; Bennett Tr. at 5447-5450; Exhibits CDN-4-B, CDN-R-1-E; Appendix A.)

54. CDC's allocation does not inflate the Distant Fees allocated to Canadian signals. This Copyright Arbitration Royalty Panel ("Panel") may recall that Jonda Martin testified that the Canadian Total Royalties (shown on this exhibit as "All Fees") were inflated by the Minimum Fee. (Martin Tr. at 7094-7096). The first page of this exhibit shows that in 1998-1, *All Fees* allocated to Canadian signals totaled $1,191,868. The *Distant Fees* and *All Fees Except Minimum Fees* were the same, at $1,160,429. The difference, $31,437, is

the Minimum Fees allocated to Canadian signals by CDC. No portion of this was allocated to Canadian Distant Fees. In fact, this $31,437 takes into account both the partially distant Canadian signals and fees allocated to Canadian signals where the system carried no distant signals at all. Thus, while Ms. Martin's testimony was accurate, it could have been misunderstood to mean that Canadian Distant Fees were inflated in the same manner as Educational and Network Distant Fees. That is not the case. (Bennett Reb. at 8-9; Bennett Tr. at 5408-10; Exhibit CDN-R-1-E.)

55. Cable systems in the Canadian Compulsory Zone generate approximately 25% of the total royalties generated throughout the U.S. but generate approximately 30% of the Minimum Fee royalties. Royalty fees paid for Canadian signals represent approximately 3% of the fees paid throughout the U.S., but represent they represent approximately 11-12% of the fees paid by systems within the Compulsory Zone. (Bennett Tr. 5456-5464; 5469-71; Gruen Tr. at 10565-70; Exhibits CDN-4-B, CDN R-1-X (Impeachment), PS 98-99 39-X (Impeachment); PS 98-99 40-X (Impeachment); Appendix A.)

56. Significantly, the first DSE worth of distant signals is not fairly characterized as "free" because there are costs associated with the carriage of distant signals beyond just royalty payments. Thus, the decision to carry a signal is an indication of cable operator preference. In fact, systems used to carry Canadian signals as one of many distant signals and over time dropped the other signals and retained the Canadian, suggesting a strong valuation for Canadian signals. The fact that a cable system presently pays a royalty equal to the Minimum Fee does not mean that the Canadian signal is suddenly less valuable than it had been in the past. (Calfee Reb. at 10-11, Bennett Tr. at 5497.)

57. Approximately 65% percent of all royalties paid by Form 3 Cable Systems were paid by systems carrying one or less DSEs. Even when the effect of the Minimum Fee is accounted for by considering royalties less the Minimum Fee, approximately 53% to 54% percent of royalties paid by Form 3 Cable Systems were paid by systems carrying one or less DSEs. Because a very substantial portion of royalties are paid by systems with exactly one DSE or less, there is no objective evidence that the first DSE worth of signals is "free"

and any expert testimony to the contrary is unsupported. Rather royalties paid for the first DSE remain a good measure of value. (Bennett Reb. at 6-9; Calfee Reb. at 11; Exhibit CDN-R-1-C.)

3. The CCG's Share of Royalties Paid by Cable Operators Has Doubled As A Proportion of the Entire Fund

58. To recognize changed circumstances, one must analyze distant royalties rather than total royalties (which includes the Minimum Fee) so that current carriage and royalty data can be compared to prior years, when only a negligible portion of royalties were attributable to Minimum Fees. (Bennett Dir. at 1-2; Bennett Reb. at 2; Bennett Tr. at 5286-87, 5293-94.)

59. The amount of cable royalties paid into the fund has dropped dramatically. In 1992-2, collected royalties for distant carriage amounted to just over $90 million. In 1998 and 1999, the amount collected per accounting period for distant carriage was approximately $40 million. This can be attributed, in part, to the fact that independent signals experienced a precipitous decline in fees, going from $84.5 million in 1992-2 to $32.6 million in 1998-1. The overall change in royalties in this period is shown in the following table:

Comparison of Cable Royalties (Excluding Minimum Fees)		
Year	**All Distant Fees**	**Basic Fees**
1990	$163,355,867	$120,384,752
1991	$174,127,124	$129,658,315
1992	$182,156,802	$136,766,337
1998	$77,148,906	$67,387,814
1999	$81,456,044	$70,967,638

(Bennett Dir. at 4-6; Exhibit CDN-4-B; Appendix A.)

60. Part of the reduction in fees is due to the drop in carriage of WTBS, but other factors also have contributed to this decline, including the growth of satellite television as a competitor to cable, reductions in basic service subscription rates, changes in regulations governing the cable industry, and mergers and ownership changes within the cable industry. (Bennett Tr. at 5438-5444; Written Direct Testimony of Dr. Thomas Hazlett at 9-39; Transcript of Oral Testimony of Dr. Thomas Hazlett at 872-74, 902-03.)

61. Amidst these dramatic changes and resulting decline in fees, the actual dollars paid in Basic Royalties by cable systems for the right to carry distant Canadian signals has remained relatively stable since the 1990-1992 period. (Bennett Dir. at 5; Bennett Tr. at 5282; Exhibit CDN-4-B.)

62. The following table summarizes the change in total and Basic Royalty fees attributable to the carriage of Canadian signals from the prior proceeding to the present proceeding as a percentage of all such fees. The 1998 and 1999 numbers exclude Minimum Fees:

Royalties Paid for Canadian Signals as a Percentage of Royalties		
	All Fees	**Basic Fees**
Average 1990-1992	1.58%	1.97%
1998	2.96%	3.31%
1999	3.28%	3.64%

(Bennett Dir. at 4-6; Appendix A.)

63. In the Rebuttal phase of the 1990-1992 proceeding, CCG provided a detailed analysis of the minimum and maximum Basic Royalties that could have been paid for the carriage of distant Canadian signals. This Min-Max analysis is only applicable to Basic Royalties because such royalties are calculated on a sliding scale based on the number of

DSEs a cable system carries. The 3.75 Fee and Syndex royalties are not based on sliding scales, so there is little ambiguity about what was paid for each signal, and no ambiguity about what is paid for a class of signals, such as Canadian, U.S. independent, or network signals. In 1991-1992, the CDC allocation of royalties was approximately the midpoint in the range between the minimum and maximum Basic royalties. (Bennett Reb. at 1-4; 1990-1992 Written Rebuttal Testimony of David Bennett ("1990-1992 Bennett Reb.") at 1-7; 1990-1992 CCG Exhibit CDN-R-1-A (1990-1992 Bennett Reb. and Exhibits are located at Tab 7 of the CCG's Designation of Testimony from Prior Proceedings).)

64. The technique used to calculate the Min-Max Basic fees for a signal type is straightforward. First, royalties that a cable system would have paid, based on the formulae in the Statement of Account, for all Canadian distant signals can be calculated for each individual system carrying such signals as if they were the first distant signals carried (which generates the highest Basic Royalties) and as if they were the last distant signals carried (which generates the lowest Basic Royalties). The sum of all of the royalties based on treating the Canadian signals as the first signals provides the maximum royalties that might have been paid for Canadian signals. The sum of all the royalties based on treating the Canadian signals as the last signals provides the minimum royalties that might have been paid for Canadian signals. While this analysis can be done for all signal types, such an approach would not be practical because of the amount of work required. The following table shows the results of this Min-Max analysis conducted for Basic royalties paid for the retransmission for all Canadian signals carried on a distant basis by Form 3 U.S. Cable systems for 1998-2 and 1999-2, as well as the results of prior analysis for the 1991-2 and 1992-2 periods:

Minimum and Maximum Basic Royalties Paid for Canadian Signals			
Accounting Period	**Maximum Canadian Basic Royalties**	**CDC Allocation of Canadian Basic Royalties**	**Minimum Canadian Basic Royalties**
1991-2	$1,573,058	$1,262,459	$1,010,951
1992-2	$1,654,633	$1,337,176	$1,072,095
1998-2	$1,183,725	$1,097,286	$1,050,862
1999-2	$1,428,206	$1,317,249	$1,293,624

(Bennett Reb. at 1-5; See also prior testimony incorporated herein showing analysis for educational signals, 1990-1992 Bennett Reb. at 1-9; 1990-1992 CCG Exhibit CDN-R-1-G.)

65. The CDC allocation of Basic royalties for Canadian distant signals is close to the bottom of a narrow range of what cable operators might have paid. While it is impossible to know whether a cable operator considered a certain signal to be the one paid for at the highest DSE rate or the lowest DSE rate, the range of those rates can be determined. (Bennett Reb. at 2-5.)

66. One noteworthy change from the 1991-1992 period is that the reduction in the overall carriage of distant signals by U.S. cable systems has narrowed the range of the minimum and maximum royalties. In fact, for Canadian signals, the CDC allocation is just 2% to 4% greater than the absolute minimum and just 8% percent lower than the absolute maximum. Table 4 shows the difference between the 1991-1992 period and the 1998-1999 period:

Basic Royalty Range for Canadian Signals		
Accounting Period	**Maximum Canadian Basic Royalties as a Percentage of the CDC Allocation**	**Minimum Canadian Basic Royalties as a Percentage of the CDC Allocation**
1991-2	125%	80%
1992-2	124%	80%
1998-2	108%	96%
1999-2	108%	98%

(Bennett Reb. at 5.)

4. The Overall Pool of 3.75 Rate Fee Royalties Has Decreased Dramatically since 1990-1992

67. The 3.75 Fee Royalty fees have decreased from about 25% of the total distant royalties in 1992-2 to about 13% in 1999-2, and have dropped dramatically in actual dollar amounts as shown in the table below:

Comparison of 3.75 Fee Royalties for All Signal Types	
Year	**Total 3.75 Fee Royalties**
1990	$42,662,316
1991	$44,277,994
1992	$45,240,632
1998	$9,671,797
1999	$10,408,844

(Bennett Dir. at 2; Exhibit CDN-4-B, Appendix A.)

68. In contrast to the Basic fees paid for Canadian signals, the actual amounts paid under the 3.75 Rate for Canadian signals has fallen roughly in proportion to the drop in the total 3.75 Rate fund. The following table summarizes the change in 3.75 Fees attributable

to the carriage of Canadian signals from the prior proceeding to the present proceeding as a percentage of all distant 3.75 Fee Royalties.

3.75 Fee Royalties Paid for Canadian Signals as a Percentage of all Such Royalties	
	3.75 Fees
Average 1990-1992	0.35%
1998	0.25%
1999	0.63%

(Bennett Dir. at 6; Exhibit CDN-4-B.)

5. Canadian Distant Signals Were Available to More American Cable Subscribers in 1998 and 1999 than in 1992

69. The relative percentage of subscribers and Total Distant and Basic Royalty fees attributable to Canadian signals has approximately doubled since the time covered by the 1990-1992 cable royalty distribution proceeding. (Bennett Dir. at 6; Exhibit CDN-4-B.)

70. The number of subscribers on systems carrying Canadian signals on a distant basis has generally increased, particularly since 1998-1, while the number of subscribers on systems carrying no Canadian distant signals has remained flat or decreased compared to 1992-2. (Bennett Dir. at 5; Exhibit CDN-4-B.)

71. The following table summarizes the change in subscriber instances[5] attributable to the carriage of Canadian signals from the prior proceeding to the present proceeding as a percentage of all distant subscriber instances:

Comparison of Change in Distant Subscriber Instances				
Period	**Canadian Subscriber Instances**	**Percent Change from 1990-1992**	**Total Subscriber Instances**	**Percent Change from 1990-1992**
1990-1992 Yearly Average	1,896,883		122,365,161	
1998	2,386,352	26%	67,107,694	-45%
1999	2,478,776	31%	68,521,617	-44%

(Exhibit CDN-4-B, p.5.)

72. From 1990-1992 to 1998 and 1999, the percentage of subscribers receiving Canadian distant signals more than doubled, as shown in the following table:

Change in Canadian Share of Distant Subscriber Instances		
Period	**Share of Total**	**Percent Increase from 1990-1992**
1990-1992 Yearly Average	1.55%	
1998	3.56%	130%
1999	3.62%	134%

(Exhibit CDN-4-B, p. 5.)

5 The number of subscribers presented in this table is cumulative. So, if a cable system has 10,000 subscribers and carries one Canadian and four independent signals on a distant basis in a given accounting period, CDC allocates 10,000 subscribers to Canadian signal for that period and 10,000 to each independent signal. Though the total number of subscribers reported by CDC exceeds the number of people subscribing to cable in the U.S., the subscriber instances reported by CDC are an accurate depiction of the number of people who can see a particular distant signal in the U.S. and, in the aggregate, present a reasonable basis for comparing the relative reach of each signal type. (Bennett Dir. at 4-5.)

73. The growth in Canadian instances of carriage is the result of the growth of cable systems carrying Canadian distant signals even where subscriber instances are falling off dramatically overall. (Bennett Tr. 5465-67; Exhibit CDN-4-B.)

74. The increase in Canadian programming as a portion of the mix of all programming retransmitted on a distant basis by cable systems is further illustrated by the BIA Financial Network Time Study. Between 1992 and the 1998-1999 period, Canadian programming grew from 1% to 3.68% of all programming aired on television stations that were carried as distant signals. Relative to other programming categories, this represents a 268% increase in the amount of Canadian programming that was actually available to Form 3 cable subscribers. This is a substantially larger increase than was experienced by any other programming category. (Written Direct Testimony of Mark Fratrick at 13-14 (as corrected); Transcript of Oral Direct Testimony of Mark Fratrick at 2050-2051, 2061; Ducey Dir. at 10 (as corrected).)

D. Valuing Canadian Distant Signals Is A Complicated Process That Is Best Accomplished By Reference to the Royalties Actually Paid By Cable Operators

75. Three factors complicate this Panel's task of evaluating the relative economic value of Canadian programming carried on distant signals: (1) the cable operators must purchase entire signals rather than discrete programming; (2) the fees for distant signals are fixed by law; and (3) certain types of programming, including Canadian programming, occupy a "niche" market because such programming is only available to a small percentage of cable subscribers. (Written Rebuttal Testimony of John E. Calfee (Calfee Reb.) at 2-3.)

76. In light of the these complicating factors, the reasonable starting point for allocating royalties to CCG members is to work with the amounts actually paid for carrying Canadian distant signals. This approach focuses on actual market transactions rather than surveys or models, and therefore bypasses any difficulties associated with

assessing value in niche markets. Market transactions are particularly useful in assessing the value of Canadian programming, which is uniquely associated with Canadian distant signals; Cable operators are expressing a direct and clear demand for Canadian programming when they chose to offer Canadian signals to their subscribers (Calfee Reb. at 10.)

77. U.S. cable systems are selective in their choice of signals and predominantly retransmit those Canadian signals that contain the highest percentages of Canadian content. For example, in 1999, the eight Canadian signals with more than 70% Canadian content had about 83% of the subscribers and accounted for almost 88% of the fees attributable to the retransmission of Canadian carried on a distant basis. The remaining 12 signals carried an average of only 53% Canadian content and collectively were responsible for about 12% of the fees and 17% of the subscribers. (Bennett Dir. at 6-7; Bennett Tr. at 5427-28; Exhibits CDN-4-C & CDN-4-D.)

78. Canadian stations that tend to carry more U.S. programming, (non-CBC stations), do so because such programming can be purchased inexpensively. Those signals also tend to broadcast through the night with "filler" content such as promotional or "infomercial" programming. Significantly, these signals tend to have the fewest instances of carriage among all the Canadian signals, reinforcing the conclusion that U.S. cable operators carry Canadian signals for the unique Canadian content. (Bennett Tr. at 5434-35; compare content shown on Exhibit CDN-4-C with instances of carriage in Exhibit CDN-1-B, p. 3.)

79. Royalty payments for retransmitted Canadian signals will not provide an inflated estimate of the value of those signals because, among other reasons, adding or continuing to carry a distant signal poses a substantial cost to the cable system, regardless of whether a royalty must be paid. This is reflected in the fact that approximately 16% to 19% of cable systems did not carry any distant signals in 1998 and 1999 despite having to pay for at least one. (Calfee Reb. at 10; Exhibit CDN-4-A.)

80. Historical carriage data also indicates that Canadian signals are worth at least what was paid for them by the cable operator. In a great majority of the systems now retransmitting Canadian signals and no other distant signal, the Canadian signal used to be one of two or more distant signals. Often those cable systems that dropped other signals chose to retain only the Canadian signal. (Bennett Reb. at 6; CDN-R-1-B.) There is no reason to assume that the value of Canadian signals has declined just because cable operators have dropped other signals. In fact, the continued carriage of Canadian distant signals provides a strong indication that royalty payments for Canadian signals tend to represent value to cable systems. (Calfee Reb. at 11.)

81. Of all the cable copyright royalty payments made in 1998 and 1999, approximately 65% were paid by cable systems that either (1) did not retransmit any distant signals or (2) retransmitted signals totaling less than or equal to one Distant Signal Equivalent. This indicates that royalty payments that overlap the Minimum Fee represent a large proportion of total royalty payments. If these payments were made for signals that were essentially worthless, one would expect to observe a strong political reaction as the well organized cable industry lobby would seek to be relieved of an onerous payment burden that yields only negligible value to cable systems. (Calfee Reb. at 11; Bennett Reb. at 6; CDN-R-1-B.)

82. Niche programming remains very valuable to cable operators because it allows them to meet a small but strongly felt consumer demand for certain products. Fees paid by operators for niche signals have the greatest significance as an indicator of market value. (Calfee Reb. at 3.)

83. Moving away from royalty data is particularly problematic for small claimant groups because doing so assumes—without evidence—that the value of programming varies dramatically from the royalties paid. For example, one "hypothetical" presented during the cross-examination phase of these proceedings assumed knowledge of the relative value of programming categories to a cable operator and that those values were disproportionate to the royalties paid. With those assumptions, the "hypothetical" was "fixed" to lead to the conclusion that royalties were not a good starting point for an

allocation of fees. Yet, there is no evidence that actually proves that the royalties paid are disproportionate to the value of the signal. In fact, because cable operators make rational decisions about what to carry, it is more likely than not that royalties *are* proportional to the value of the signal. (Bennett Tr. at 5411-541; Gruen Tr. 10524-33; Trautman Tr. at 10294-99.)

E. The Canadian Survey Of U.S. Cable Systems Carrying Canadian Distant Signals Provides An Accurate Measure Of The Minimum Relative Value Of Canadian Programming On Those Signals

1. The Canadian Survey Was Designed To Estimate The Value Of Canadian Programming On Canadian Distant Signals

84. In the years 1996 through 1999, marketing experts Drs. Debra Ringold and Gary Ford conducted a constant sum survey of the eligible population of Form 3 cable systems retransmitting either a distant English-language or distant French-language Canadian signal. The survey was entitled "The Value of Canadian Programming to Cable Systems in the United States: 1996-1999" ("Canadian Survey"). The Canadian Survey examined entire populations rather than samples drawn from these populations. The primary objective of this research was to estimate the value of Canadian programming on distant Canadian signals retransmitted by Form 3 cable system operators in the United States. The results of the Canadian Survey can be used to allocate the fees paid for the carriage of Canadian distant signals. (Written Direct Testimony of Debra J. Ringold ("Ringold Dir.") at 2; Ringold Tr. at 5522-23, 5525-28, 5543-44, 5556, 5558-59.)

2. The Research Methodology Used By Drs. Ford & Ringold Was Rigorous And Designed To Accurately Gauge Value While Avoiding Significant Bias Or Error

85. The constant sum technique has been well studied and is considered a sound and reliable tool for measuring relative values. It is well suited to the task of determining a

cable operator's valuation of programming on a single distant signal. (Ringold Tr. at 5533, 5583-5613.) Constant sum methodology promotes deliberation on the part of the respondent and the results are reflective of what respondents have actually done, are doing now or will do in the near future. (Ringold Tr. at 5594-95.)

86. The Canadian Survey was not a sample survey. Rather, the Canadian Survey was taken of the entire population of eligible systems. A diligent effort was made to reach every cable system in the eligible population. An eligible system is defined as a Form 3 U.S. cable system that carried one or more Canadian signals on a distant basis in either accounting period of the survey year and where the individual respondent could not participate in more than two interviews. Several steps were taken to increase response rates: (1) the systems were initially contacted to obtain the identity of the qualified respondent for the system; (2) the respondent was faxed a notification letter; (3) the respondent also was offered an honorarium to participate; (4) the survey company continued efforts to reach the respondent until the survey was completed or the respondent expressly refused to participate; and (5) the survey company used the same interviewer for all four years for consistency and experience. (Ringold Dir. at 7-10; Ringold Tr. at 5525-26, 5543-47.)

87. The Canadian Survey asked about the value of seven different types of programming carried on a single Canadian signal randomly chosen from those Canadian signals retransmitted by the cable system. The seven types of programming were: (1) live professional and college team sports, excluding Canadian Football League games; (2) Canadian-produced news, public affairs, religious, and documentary programs; (3) U.S. syndicated series, movies, and specials; (4) sports programming such as the Olympics, Canadian Football League games, skating, skiing, tennis, and auto racing; (5) Canadian-produced series, movies, arts and variety shows, and specials; (6) Canadian-produced children's programming; and (7) other programming. This approach allowed a signal-specific determination of the relative value of Canadian-produced programming on Canadian signals compared to programming produced by members of other claimant groups. (Ringold Dir. at 3, 9-10; Ringold Tr. at 5534-35, 5549-50.)

88. Similar categories of programming shown on a randomly chosen superstation and a randomly chosen U.S. independent station carried by the respondents' systems were also evaluated to reduce the chances that respondents would guess the survey purpose or sponsor. Starting in 1998, programming on cable network WTBS was evaluated when no other U.S. distant signal was carried. (Ringold Dir. at 3, 9-10; Ringold Tr. at 5527-29.)

89. Response bias occurs when survey respondents know the purpose of the survey and unconsciously or consciously modify their responses in a way that affects the outcome. In the Canadian Survey, response bias was substantially reduced by (1) making the survey double blind so that neither the respondent nor the interviewer were told the purpose of the survey, (2) limiting multiple respondents, and (3) using similarly-worded questions about U.S. independent stations as foils. (Ringold Dir. at 8-10; Ringold Tr. at 5530-5533.)

90. The Canadian Survey was conducted with the persons responsible for deciding which distant signals their cable systems retransmit ("respondents"). On average, each respondent was in this position at his or her cable system for seven years and thus, was experienced at making these decisions. Respondents were also queried as to their program budget responsibilities. Ninety-four percent of the respondents identified themselves as the individual responsible for making program budget decisions or recommendations. (Ringold Dir. at 2, 6-7; Ringold Tr. at 5525.)

91. It is highly unlikely that the Canadian Survey—which garnered response rates of 75%, 72%, 82%, and 82% for years 1996 through 1999, respectively—contains any non-response bias. Non-response bias increases where a survey has a large percentage of non-respondents, thereby making the data collected less compelling because of the large number of uncounted or untabulated results. As the response rate increases, the likelihood of non-response bias decreases. Response rates of 50% are the bare minimum necessary to avoid non-response bias. As response rates approach 70-80%, non-response bias is no longer a concern." (Ringold Dir. at 2, 8; Ringold Tr. at 5547-49.)

3. The Results Of The Canadian Survey Indicate That Canadian Programming Was The Predominate Source Of Value On The Canadian Distant Signals

92. The results of the Canadian Survey are summarized briefly in the following table:

Yearly Canadian Survey Results				
Programming Category	**1996**	**1997**	**1998**	**1999**
Canadian-produced programming	64%	63%	59%	58%
Live professional and college team sports	24%	25%	29%	28%
U.S. syndicated series and movies	11%	11%	11%	13%
Other programming	1%	1%	1%	1%

(Ringold Dir. at 4, 13-17; Ringold Tr. at 5549-51.)

93. Based on her experience with this data, Dr. Ringold concluded that the Canadian Survey results should be considered longitudinally by combining and averaging all four years, taking into account the number of respondent in each. This approach yields the following result (which totals 101% due to rounding principles):

Summary of Canadian Survey Results	
Programming Category	**Relative Value**
Canadian-produced programming	61%
Live professional and college team sports	27%
U.S. syndicated series and movies	12%
Other programming	1%

(Ringold Dir. at 4, 13-17; Ringold Tr. at 5555, 5573.)

94. In contrast to the valuations given to sports and U.S. series and movies on Canadian signals, on U.S. signals those programming categories were given higher relative values by cable system operators. On superstations (including WTBS) live professional and college team sports were valued at approximately 31%, 30%, 33%, and 30% for the years 1996 through 1999. On independent stations, live professional and college sports were valued at approximately 27% in 1996, 32% in 1997, 32% in 1998, and 28% in 1999. (Ringold Dir. at 4, 13-17; Ringold Tr. at 5551-52.)

95. Similarly, movies and syndicated series were valued at approximately 38%, 39%, 41%, and 39% on superstations in 1996 through 1999. Movies and syndicated series were valued at approximately 36%, 35%, 34%, and 39% on independent stations during the same period. Both superstation and independent station evaluations are substantially higher than the 11%, 11%, 11%, and 13% values reported for U.S. movies and syndicated series on Canadian signals. (Ringold Dir. at 5, 13-17; Ringold Tr. at 5551-52.)

96. These results indicate that cable system operators who retransmit Canadian signals do so primarily for their unique Canadian programming, but also value the live professional and college team sports carried on these signals. U.S. syndicated shows and movies on Canadian signals appear to have less value to cable system operators. (Ringold Dir. at 5, 17; Ringold Tr. at 5555-56.)

F. No Party Other Than The Canadian Claimants Group Has Introduced Accurate, Substantive Evidence Regarding The Relative Value Of Programming On Canadian Distant Signals

97. The only attempts by other claimant groups to offer substantive evidence of the value of Canadian Programming are the Bortz Survey and the Rosston Regression and the various "adjustments" to those data. Because the Bortz and Rosston studies provide no accurate data about the value of Canadian programming, neither of those studies nor the derivative adjustments, can be used in allocating royalties to the CCG. (Calfee Reb. at 4-9.)

1. By Design, The Bortz Study Cannot Accurately Measure The Value Of Small Programming Categories Such as Canadian Programming.

98. The Bortz survey is an inadequate tool for assessing market valuation of programming that occupies a niche market such as that enjoyed by Canadian programming. The Bortz study cannot distinguish between a relative market valuation of zero for Canadian programming and a relative valuation of perhaps as much as 3 or 4 percent. It is like using a bathroom scale to weigh a T-shirt. (Calfee Reb. at 4.)

i) The 1990-1992 CARP Concluded, Based On Substantial Evidence, That The Bortz Survey Could Not Accurately Measure The Value Of Canadian Programming

99. In the 1990-1992 Proceeding, the Bortz study was exposed to extensive criticism by economic experts and others. Dr. Calfee opined that the Bortz study—in particular, the crucial evaluation question within that study—is at best, a means for getting rough estimates. (1990-1992 Written Rebuttal Testimony of Jack Calfee at 5-7, attached as Tab C. to the 1998-1999 Calfee Reb.)

100. In 1990-1992 Proceeding, evidence was introduced showing numerous reasons why the Bortz study was too inaccurate a tool to measure a niche programming category like that claimed by the CCG. The Bortz approach had two main flaws: First, it cannot provide reasonable estimates of the value of Canadian programming because the study introduces uncertainties and confusion that—while possibly acceptable in estimates for large market segments—are clearly unworkable for the task of estimating a niche share. Second, it failed to take advantage of the fact that Canadian programming is uniquely associated with distant Canadian signals. In other words, cable operators are expressing a demand for Canadian programming when they order Canadian signals. (1990-1992 Calfee Reb. at 10.)

ii) Witnesses Have Repeatedly Indicated That The Bortz Survey Does Not Accurately Measure The Value Of Canadian Programming.

101. In the 1990-1992 Proceeding, the most express evidence of the inability of the Bortz survey to measure a small programming category like the Canadian programming came from Paul Bortz himself, during his Direct Case Testimony:

> Q But when you said there's not a lot of variation, what do you consider to be not a lot of variation? What do you consider to be important in this case in terms of percentages?
>
> A I think, given the inherent problems of any kind of an estimate of what it is that you have to do, *that within a few percentage points: two, three, four.*
>
> Q Do you know how much two or three percentage points is worth in this case? Do you realize it's over about $20 million. Do you think that's important?
>
> A That's right. And in looking at the task that's been assigned, looking at the information and data available, *I feel that a very good estimate is an estimate that is within a few percentage points.*

(1990-1992 Transcript of Oral Testimony of Paul Bortz at 742 (emphasis added).)

102. The current Bortz study recognizes the difficulty of assessing the value of Canadian programming: "The 1990-1992 CARP report noted the difficulty of using the cable operator surveys to determine the value to be accorded Canadian programming. This assessment was based on Bortz Media's testimony regarding the very small number of responding systems that carry Canadian signals, and the resulting statistical uncertainty reflected in the allocation estimate for Canadian programming. We acknowledge that the survey methodology is not designed to develop estimates with small relative error rates for programming carried by fewer than 4% of systems and that (when measured across all systems) accounts for only a fraction of a percentage point of value." (Calfee Reb. at 4,

quoting JSC Exhibit 1, Operator Evaluation of Distant Signal Non-Network Programming, December 2002, P. 42.)

103. In the most recent Bortz study, the year 1998 sample of 139 cable systems included only two systems with Canadian signals and the year 1999 sample of 132 systems included only three systems with Canadian signals. This fact reinforces the conclusion that the Bortz study cannot provide reasonable estimates in market valuation of Canadian programming. (Calfee Reb. at 4, citing Transcript of Oral Direct Testimony of James Trautman ("Trautman Tr.") at 548-51.)

104. In this proceeding, James Trautman, sponsor of the Bortz survey stated: "because of the small incidents of carriage of Canadian signals [] the design of our survey really doesn't yield values for Canadian programming with a lot of statistical reliability." (Trautman Tr. at 548.) In fact, the confidence intervals were so high that the error range for Canadian programming was 100%. (Trautman Tr. at 548-49.)

105. Even PTV expert William Fairley believes that the Bortz data for Canadian programming was unusable because of the small sample size, stating:

> "[W]hile I have reported calculation and data for the Canadian share, the Bortz sample size is too small to draw any conclusive estimates for that category."

(Written Direct Testimony of William B. Fairley ("Fairley Dir.") at 2, n.2.)

2. The Rosston Regression Provides No Meaningful Information About The Value Of Canadian Programming Because It Is Fundamentally Flawed

106. The Rosston report describes the results of an econometric study in which statistical methods were employed to estimate cable systems' valuation of various programming categories, including Canadian programming. Statistical analysis of such demand is inherently difficult because purchasers must either buy or not buy a product at a

fixed price and because purchasers vary greatly in their intensity of demand for product. (Calfee Reb. at 5.)

107. Extreme variation in demand by cable systems applies with particular force to Canadian programming. For a relatively small number of cable systems, the value of distant Canadian signals greatly exceeds the royalty payment. (Calfee Reb. at 5.)

108. Imprecision in economic estimates can prevent an econometric model from yielding reliable estimates of the value of Canadian programming. This is true even if methods employed are useful for assessing the value of programming that comprise large market shares. (Calfee Reb. at 5.)

109. The Rosston report is a remarkably imprecise analysis of demand. This can be seen by examining a statistical measure, R^2, which represents a proportion of variance that is accounted for by the explanatory variables in the regression. Rosston's regression resulted in a R^2 of approximately 0.70, interpreted as explaining 70% of the variation in royalty payments. Of that 70%, the 8 programming variables explained only about 2% of the variance in royalty payments (they had a combined R^2 of 0.02). The remainder of the explanatory power of regression model came from a single variable, the number of subscribers, which by itself had an R^2 of approximately 0.67 indicating that it alone explains 67% percent of the variance in royalty payments. (Calfee Reb. at 6 to 7; Written Rebuttal Testimony of Martin R. Frankel ("Frankel Reb.") at 8-10.)

110. In short, none of the programming variables account for a significant proportion of variability in royalties. Sports and syndicated programming, which provide the most predictive power of the programming variable, each account for only about 1% of the total variability of royalty payments. (Calfee Reb. at 7.)

111. Further illustrating the lack of explanatory power of the Rosston regression are the broad ranges of confidence intervals on the programming category coefficients. For example, the sport programming co-efficient ranges from 0.90 to 2.37, while that for

commercial TV ranges from 0.02 to 0.27. These broad ranges imply similarly broad ranges when one uses the co-efficient as a guide to the allocation of royalties. Such wide ranges may be manageable in the give and take of dividing royalty payments among the larger claimants, but such levels of imprecision raise serious doubts about using the model for small market shares. (Calfee Reb. at 9; *see also* Gruen Reb. at 4-5 (discussing wide variability of results); Frankel Reb. at 3-16.)

112. Taken together, these varied results indicate that the Rosston model cannot be used to provide reasonable estimates of market valuation of Canadian programming obtained through distant signals, and cannot be used to allocate royalty payments in a manner that yields a reasonable allocation for Canadian programming. (Calfee Reb. at 9.)

3. The Nielsen Study Sheds No Light on the Value Of The Programming On Distant Canadian Signals because Canadian Signals were not Included in the Study

113. The Nielsen Study provides no data about the value of Canadian Programming because no Canadian signals were included in the study. (Kessler Dir. at 22 and Exhibits PS 98-99 10 and PS 98-99 11 (containing no Canadian signals); *see generally* Written Direct Testimony of Paul Lindstrom and related exhibits.)

G. The Value Of Music Does not Exceed 2.33 Percent of the Total Royalty Fund

114. "Music Claimants represent the authors, composers and publishers of copyright music on whose behalf they license to music users such as radio and televisions stations, …" (Direct Case of The Music Claimants at 2). Music Claimants thus represent only the musical works themselves, that is the written music and lyrics. The Music Claimants do not represent that portion of music appearing on distant retransmitted signals that arise from the contributions of the musicians, vocalists, conductors, sound engineers and producers. (Written Rebuttal Testimony of George R. Schink ("Schink Reb.") at 9 n.9.)

115. Music license fees, negotiated in a free market in 1998, accounted for approximately 2.33% of the commercial television programming costs. (Schink Reb. at 15-16.)

116. Music license fees, negotiated in a free market in 1998, accounted for approximately 1.49% of the commercial television licensing fees paid by the broadcast industry. (Schink Reb. at 15-16.)

117. Absent a compulsory license, had the Music Claimants licensed distant signal rights to the musical works they represent (the cost of the written music and lyrics) there is no reason to believe they would have negotiated higher rates that the 1.49% to 2.33% they achieved in the broadcast market. (Schink Reb. at 15-16.)

H. Proposed Treatment of Stipulated Distributions of Royalty Funds to NPR and the Devotional Claimants

118. By Stipulation signed by the parties and dated on or about June 6, 2002 and entered into the record of this Proceeding on June 4, 2003, National Public Radio ("NPR") shall receive "0.18 percent of the total funds available for the 1998 and 1999 distribution." The most practical interpretation of this settlement is to give NPR 0.18 percent of the total royalties in the Basic, 3.75 Fee and Syndex Funds for 1998 and 1999. (*See* Stipulation for Settlement of Claim of National Public Radio to 1998 and 1999 Cable Royalty Funds, dated June 2, 2002 ("NPR Settlement"); Transcript at 6762, 6792.)

119. By Stipulation signed by the parties and dated on or about November 9, 2002, and entered into the record of this Proceeding on June 4, 2003, the Devotional Claimants shall receive "1.19375% of the Basic Funds and 0.90725% of the 3.75% Funds for each of 1998 and 1999." These shares come from "the total funds available (after earlier stipulated distribution to National Public Radio)" and thus are taken from the funds *before* any award is made to the Music Claimants. The Devotional Claimants receive no portion of the Syndex Fund. (*See* Stipulation for Settlement of Claim of National Public Radio to 1998

and 1999 Cable Royalty Funds, dated November 5, 2002 ("Devotional Settlement"); Transcript at 6762, 6792.)

120. By taking a percentage of all funds, the NPR Stipulation requires that the claims of the CCG and all other arbitrating parties be adjusted downward by 0.18 percent. The settlement of the Devotional Claimants appears to require that it be taken from the funds remaining after the NPR distribution but before any distribution to Music Claimants or any other party. (*Compare* NPR Settlement to Devotional Settlement.)

I. The Best Method For Determining An Award For The CCG Is To Allocate The Royalties Paid For Canadian Signals To Only The Owners Of Programming Retransmitted On Those Signals According To The Relative Value Of That Programming

121. The royalties paid for signals carrying a niche programming category like Canadian programming is the best starting point for an award to the CCG. (Calfee Reb. at 10.) The next step in making an award is to separate out the relative value of the programming on those signals. That can be done by using the Canadian Survey sponsored by Dr. Ringold in conjunction with the Canadian Content Data sponsored by David Bennett. (Ringold Tr. at 5555-56; Bennett Dir. at 6-7; Bennett Tr. at 5427-28, 5487, 5371-73.) It is supported by the testimony of Janice de Freitas, Andrea Wood and Lucy Medeiros. Combining these pieces of information is a sound approach to determining an award for the CCG. (*See generally*, de Freitas Dir.; Wood Dir; Medeiros Dir.)

122. In his rebuttal testimony, Mr. Trautman used the CCG methodology to make a proposed award for the CCG. He began by identifying the fees paid for Canadian signals. He then did an allocation to the three programming groups on the Canadian signals using only the Canadian Survey and allocated the remaining royalties paid for other signals using the Bortz survey. Mr. Trautman's approach illustrated a method for integrating the CCG methodology with approaches taken by the remaining claimants. (Written Rebuttal Testimony of James Trautman ("Trautman Reb.") at 4-5 and Trautman's appendix B.)

III. PROPOSED CONCLUSIONS OF LAW

A. The CCG's Distribution Theory Is Grounded in the Legal Standard Requiring that Royalties Paid for the Carriage of Canadian Signals Reach the Copyright Owners of the Works Retransmitted on Those Signals

1. Congress Intended that Canadian Copyright Owners Receive Their Fair Share of the Royalties Collected

Canadian stations were included in the compulsory license granted to U.S. cable operators because cable operators wanted to carry Canadian stations.[6] Congress explicitly recognized the international significance of its decision to subject the works of foreign copyright owners to a U.S. compulsory license. The Committee that wrote section 111 stressed that the foreign copyright owners whose programs were broadcast on Canadian and Mexican stations were entitled to their fair share of the royalties collected:

> The Committee wishes to stress that cable systems operating within these cable zones are fully subject to the payment of royalty fees under the compulsory license for those foreign signals retransmitted. The copyright owners of the works transmitted may appear before the Copyright Royalty Commission and, pursuant to the provisions of this legislation, file claims to their fair share of the royalties collected. Outside the zones, however, full copyright liability would apply as would the remedies of the legislation for any act of infringement.

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6 Canadian signals were discussed in the revision notes of the 1976 Act:

> CANADIAN AND MEXICAN STATIONS. Section 11(c) [subsec. (c)(4) of this section] provides limitations on the compulsory license with respect to foreign signals carried by cable systems from Canada or Mexico. Under the Senate bill, the carriage of any foreign signals by a cable system would have been subject to full copyright liability, because the compulsory license was limited to the retransmission of broadcast stations licensed by the FCC. The Committee recognized, however, that cable systems primarily along the northern and southern border have received authorization from the FCC to carry broadcast signals of certain Canadian and Mexican stations.

House Report No. 94-1476, Notes of the Committee on the Judiciary, *reprinted in* 17 U.S.C.A. § 111, Historical and Statutory notes, at 268.

House Report No. 94-1476, reprinted in 17 U.S.C.A. § 111, Historical and Statutory Notes at 269 (emphasis added).

Since the enactment of section 111, U.S. cable operators have availed themselves of the cable compulsory license for Canadian stations and have paid millions of dollars for distant Canadian English- and French-language stations. Their decisions to import Canadian stations were made even though distant[7] Canadian stations cost the same as U.S. independent stations and four times as much as U.S. network affiliates or public television stations.[8] 17 U.S.C. § 111(f)

At the express invitation of the United States Congress, Canadian copyright owners have participated in every royalty distribution proceeding, and have appeared as a Phase I group since the 1979 royalty proceeding. Unfortunately, until the 1990-1992 Proceeding, requests for "their fair share" of the "royalties collected" for Canadian stations went unheeded.

2. Only Copyright Owners With Programming On Canadian Signals Are Eligible To Share In The Royalties Paid For Those Signals

As it did in the 1990-1992 Proceeding, the CCG currently seeks an award that is directly tied to the royalties paid only for the carriage of Canadian stations. The CCG does not request any part of the royalties paid for any other copyright owner's works. The CARP in the 1990-1992 Proceeding made an award to CCG members that was obviously tied to the Canadian royalty payments while awarding the remaining royalties paid for

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7 For purposes of determining when a Canadian station is distant, section 111 defines the "local service area" for a Canadian station as being the "area in which it would be entitled to insist upon its signal being retransmitted if it were . . . subject to [the FCC's] rules, regulations and authorizations." 17 U.S.C. § 111(f). In other words, although Canadian stations did not have must-carry rights, cable systems are able to carry Canadian stations for free if they would be "local" under the FCC rules applicable to U.S. stations.

8 "To qualify as a network station, all the conditions of the definition must be met. Thus, the retransmission of a Canadian station affiliated with a Canadian network would not qualify under the definition." House Report No. 94-1476, *reprinted in* 17 U.S.C.A. § 111, Statutory and Historical Notes, at 273.

Canadian signals to JSC and Program Suppliers. (1990-1992 Proceeding, 66 Fed. Reg. at 55663-64.) In preparing for and litigating this proceeding, the CCG has relied on the last CARP's findings that the CCG award could be based on the royalties paid for Canadian signals without forcing any other party to accept the implied limitations of a "fee gen" approach.

The CCG's request for a royalty share is grounded in the fees paid for Canadian signals and is based on the legal concept of "eligibility." The Copyright Royalty Tribunal ("Tribunal") had embraced the legal concept of "eligibility" in the context of the Satellite Carrier Royalty Distribution Proceeding. In that proceeding, the Network claimants unsuccessfully argued that their award should not be limited to the royalties paid for network signals by satellite carriers. Consolidated 1989-1991 Satellite Carrier Royalty Distribution Proceeding, 57 Fed. Reg. 62422 (Dec. 30, 1992) ("Satellite Decision").

The Tribunal disagreed, finding that:

> The Networks seek to blur the 12 [cent] superstation and 3 [cent] network/public television station categories and commingle the royalty payments for an obvious reason—it is the only way they can tap into the larger stream of revenues from superstations and avoid the reality that the Networks seek a share of royalties: (i) they did not earn; (ii) based on programs they did not furnish; (iii) paid for stations that did not carry their programming.
>
> Moreover, having gained eligibility [for network programming] for royalty payment, the Networks are now trying to get through indirection from the Tribunal what they could not get—or did not seek—through direction from Congress—parity with the copyright owners which furnish programming to superstations. But their effort to seek a subsidy from the owners of programming furnished to superstations is misguided. The Networks' opportunity for increased revenues lies not in this Phase I proceeding, but in a legislative or rate-setting proceeding. (Satellite Decision, 57 Fed. Reg. at 62426.)

The concept behind the Satellite Decision was echoed in the 2000 DTRA Proceeding, in which the CARP adopted a per-performance approach to setting royalty rates. The CARP stated that "a per performance metric 'is directly tied to that nature of the right being licensed.' … The more intensively and individual service uses the rights being licensed, the more that service shall pay, and in direct proportion to the usage." *Report of the Copyright Arbitration Royalty Panel*, In re Rate Setting for Digital Performance Right in Sound Records and Ephemeral Recordings, 2000-9 CARP DTRA 1 & 2 (Feb. 20, 2002) at 37.

The per-performance metric tied the usage of copyrighted materials to royalties paid by the users of those materials. This is simply another expression of the eligibility concept: If royalties are paid for a song, only the right holders for that song should share in the royalties paid. Similarly, if royalties were paid for a signal, only the copyright holders with programming on that signal should receive a share of the royalties. Consistent with this logic, the CCG seeks an award grounded in the royalties paid for Canadian signals.

B. Changed Circumstances Justify an Increase in the Canadian Allocation

Upheaval in the cable compulsory licensing market during the years 1998 and 1999 has resulted in a dramatic change in the amount of royalties paid and in types of signals carried. The resulting changed circumstances require the relative percentage of the CCG baseline award to increase to reflect the amount paid for Canadian signals. This amount has remained steady despite the diminution in the carriage of all other types of programming. Additional changed circumstances warrant a further increase to the CCG's award.

1. Despite Dramatic Decreases in the Overall Royalty Pool, Royalties Paid for Canadian Signals Remained Constant, Resulting in a Proportionate Increase in the Percentage of Royalties Due to the CCG

The most reliable evidence of economic value in the record of this proceeding—which is, ultimately, about money—is the royalty payments. All other evidence of "relative economic value" is either hypothetical or attempts to derive meaning by analogy to other markets. These royalty payments, therefore, must be the starting point in making an award to CCG members.[9]

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9 This logic holds for other parties as well. Whether the Panel uses Bortz, Nielsen or some hybrid data for its allocation, the allocations are applied to the royalties paid for U.S. distant signals. It is just that the royalties paid for U.S. signals are such an overwhelming majority of the fees that the recognition of this fact is so obvious that it is ignored.

In 1998 and 1999, Form 3 cable operators paid a total of $4,958,099 in royalties for the carriage of distant Canadian signals. (Prop. Find. § II.C.3 and Appendix A.) That money was paid by cable operators to compensate "the creators of the programs they retransmitt[ed]." (45 Fed. Reg. at 63036.) That is, the Copyright Act required those cable systems to pay nearly $5 million in royalties exclusively to compensate the owners of programs shown on those Canadian stations.

The royalties paid each year for the carriage of Canadian distant signals in 1998 and 1999 are roughly the same as the royalties paid each year in the 1990-1992 period. In contrast, however, because of the conversion of WTBS from a distant signal to a cable network and because of the drop in carriage of other U.S. superstations, the total royalty pool decreased dramatically, from $182 million in 1992 to $79 million in 1998. (Prop. Find. § II.C.3 and Appendix A.) The net effect of this change in circumstances is that as a percentage of all royalties paid by U.S. cable systems, the percentage paid for the carriage of Canadian signals doubled.

Because these royalties can be allocated only to eligible copyright holders (i.e., the CCG, JSC and Program Suppliers), the award to the CCG must approximately double to maintain parity with the 1990-1992 award. Changed circumstances warrant this adjustment to the CCG's baseline award. Without this adjustment, the CCG is penalized for the drop of WTBS and other U.S. signals even though the CCG never received any part of the royalties paid for those signals.

2. Canadian Programming Has Increased Its Reach to American Audiences, Justifying an Increase in Royalty Payments to the CCG

Canadian programming continues to expand its American audience relative to the programming of other claimant groups. Since 1990-1992, the number of U.S. cable subscribers who have access to Canadian programming on Canadian distant signals has *increased* by more than 25% while the total number of distant subscriber instances has *decreased* by 45%. On a relative basis, the share of distant subscriber instances attributable to Canadian signals has increased 268% in this same period. (Prop. Find. § II.C.5.)

Moreover, the amount of Canadian content on Canadian signals has increased since the 1990-1992 Proceeding. For both 1998 and 1999, the content data presented by the CCG showed that Canadian programming constituted an average of about two-thirds of the programming on Canadian distant signals. Much of the American programming was actually simulcasts of U.S. network series and baseball broadcasts, which provides no additional value to U.S. cable operators because the same programs (for example, the daytime soap operas and prime-time American programs) are available on retransmitted U.S. Network stations. (Prop. Find. §II.B.2.)

It is important to note that U.S. cable operators can choose which Canadian stations to retransmit and, generally, retransmit those stations carrying more Canadian programming. Canadian stations with predominately Canadian content were responsible for the lion's share of subscribers and fees generated by Canadian signals. For 1998 and 1999, the stations carrying the highest percentages of Canadian content were responsible for generating almost 88% of the total fees. (Prop. Find. § II.D.1.) The fee-weighted percentage of Canadian content on the Canadian distant signals is 79.42% for 1998 and 80.91% for 1999. The average two-year, fee-weighted measure of Canadian content on Canadian distant signals is 80.165%. (Prop. Find. § II.B.2.) Thus, the Canadian Content Data makes clear the common sense proposition that cable systems import distant Canadian signals to provide their viewers with Canadian programming. This expression of preference is self-evident and indicates value.

Further, Canadian programming now represents a larger portion of the mix of all programming retransmitted in the U.S. The BIA Financial Network Time Study indicates that between 1992 and the 1998-1999 period, Canadian programming grew from 1% to 3.68% of all programming aired on television stations that were carried as distant signals. Relative to other programming categories, this represents a 268% increase in the amount of Canadian programming that was actually available to Form 3 cable subscribers. This is a substantially larger increase than was experienced by any other programming category. (Prop. Find. § II.D.5.)

The weighted Canadian Content analysis and Time Study both substantiate the increase in Canadian programming actually retransmitted in the U.S. This data is consistent with the Panel's objective of compensating copyright holders for retransmission.

It also justifies an increased award for the CCG. While the parties may generally agree that the volume of retransmitted programming should not serve as the primary basis for allocating royalties, there can be no serious question that time still remains a factor in the distributions: The reason that Program Suppliers get several times the award of NAB is not because a re-run of *Cheers* is several times more valuable than a local news broadcast. Rather, it is because there are many, many more re-runs of *Cheers* and other televisions shows retransmitted on cable systems than there are retransmitted local news broadcasts.

C. The Canadian Survey Provides Accurate and Reliable Evidence of the Relative Value of Canadian Programming and Supports the Award Requested by the CCG

Section II.B.3 above provides ample evidence of the depth, breadth, quality and quantity of Canadian programming broadcast on Canadian television stations. A cable operator's decision to carry a Canadian television station is influenced by the addition of such programming to their channel lineups. For example, during 1998 only those cable operators who carried CBC stations could say they were offering their subscribers unique, live coverage of the Nagano Olympics.

This qualitative evidence of value to cable operators is supported by the quantitative evidence provided by the Canadian Survey. In the years 1996 through 1999, Drs. Gary Ford and Debra Ringold conducted a study of the population of U.S. Form 3 cable systems importing English-language Canadian stations and French-language Canadian stations. The objective of the Canadian Survey was to estimate the value to cable operators of Canadian programming on Canadian distant signals retransmitted by Form 3 systems. (Prop. Find. § II.E.1.) The Canadian Survey sought a basis to apportion the money paid by the people who actually *bought* Canadian signals. This approach combines data regarding royalties actually paid with valuation responses that are grounded in natural behavior—a combination used and relied upon in the field of marketing research generally.

As detailed in the Proposed Findings, the research methodology used by Drs. Ford & Ringold was rigorous and designed to accurately gauge value while avoiding significant bias or error. (Prop. Find. II.E.2.)

The survey results indicate that cable system operators retransmit Canadian signals primarily for their unique Canadian programming rather than for programming belonging to JSC or Program Suppliers. In each of the years 1996-1999, the value of both English- and French-language Canadian programming exceeds that of NHL, MLB and NBA games and U.S. syndicated series and movies. (Prop. Find. § II.E.3.)

The results for all four years are set out in the tables in Section II.E.3 above, but the combined results over the four-year history of the study indicates that cable operators gave 61% of the value to Canadian programming, 27% to JSC sports and 12% to U.S. series and movies. (Prop. Find. § II.E.3.) The actual value of Canadian programming is higher, because the study did not instruct respondents to exclude the value that might have be attributable to simulcasts of U.S. network series, movies and U.S. originated baseball games on Canadian stations. Thus, the study establishes that the value of Canadian programming is at least 61% of the royalties paid for the carriage of the Canadian stations.

D. There is No Other Reliable Evidence in the Record That Reflects the Relative Value of Canadian Programming

Only two parties attempted to provide direct evidence of the value of Canadian programming, JSC through the Bortz study and NAB through the Rosston regression.[10] Both attempts fail because the methodologies are inherently unable to measure the value of niche programming.

1. The Bortz Cable Operator Study Provides No Evidence about the Marketplace Value of Canadian Stations

The JSC-sponsored Bortz study does not meaningfully measure the value of Canadian programming. Indeed, it is clear that the survey results do not correspond to cable operators' actual behavior with regard to Canadian stations. For example, in 1998 cable operators actually spent about 2.9% of total royalties to carry Canadian stations while

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[10] The Nielsen Study provides no data about the value of Canadian Programming because no Canadian signals were included in the study.

according to the Bortz survey, cable operators assigned only 0.2% of the value to all programming on the Canadian stations.

The specific reasons that the Bortz study does not accurately measure the value of Canadian programming were extensively addressed in the 1990-1992 Proceeding. At the end of that proceeding, the 1990-1992 CARP concluded that the Bortz number for Canadian programming was "totally unreliable as Mr. Bortz suggests that the small numbers are incapable of being accurately measured." 1990-1992 Proceeding, 61 Fed. Reg. at 55666. In the present proceeding, James Trautman, sponsor of the Bortz survey, has expressly acknowledged the limitations of the Bortz survey as applied to Canadian programming and in fact has endorsed an allocation methodology for the CCG that begins by allocating royalties paid for Canadian signals to the programming categories found on those signals.[11]

In short, the Bortz survey cannot be used to measure the value of Canadian programming on distant signals.

2. The Rosston Regression Provides No Meaningful Information about the Value of Canadian Programming

According to Dr. Jack Calfee, "[T]he Rosston report is a remarkably imprecise analysis of demand." The imprecision in the Rosston economic estimates prevents the model from yielding reliable estimates of the value of Canadian programming. The fundamental flaw of the Rosston regression is that the programming variables it purports to measure explain almost nothing about royalties. For a small category like Canadian programming, this flaw is fatal.

This flaw can be seen by examining a statistical measure, R^2, which represents a proportion of variance that is accounted for by the explanatory variables in the regression. Rosston's regression resulted in a R^2 of approximately 0.70, interpreted as explaining 70%

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11 In addition, Jack Calfee noted that the Bortz data for Canadian programming is unreliable because of the small sample size underlying those results. This was independently confirmed by PTV expert Dr. Fairley who explained: "[W]hile I have reported calculations and data for the Canadian share, the Bortz sample size is too small to draw any conclusive estimates for that category." (Fairley Dir. at 2, n.2.)

of the variation royalty payments. Of that 70%, the programming variables explained only about 2% of the variance in royalty payments (they had a combined R^2 of 0.02). The remainder of the explanatory power of regression model came from a single variable, the number of subscribers, which by itself had an R^2 of approximately 0.67 indicating that it alone explains 67% percent of the variance in royalty payments. Of course, one would expect subscribers to be a primary factor in explaining the variability of royalty payments because it is part of the formula used by cable operators in calculating the royalty payments.

Further illustrating the lack of explanatory power of the Rosston regression are the broad ranges of confidence intervals on the programming category coefficients. For example, the JSC programming co-efficient ranges from 0.90 to 2.37, while that for NAB ranges from 0.02 to 0.27. These broad ranges imply similarly broad ranges when one uses the co-efficient as a guide to the allocation of royalties. Such wide ranges may be manageable in the give and take of dividing royalty payments among the larger claimants, but such levels of imprecision raise serious doubts about using the model for small market shares.

In short, the Rosston regression appears to provide no accurate information on which the Panel can base any allocation. Even if the Panel was to find some virtue in the regression with regard to large claimant groups, it affords no reliable estimate of the value of Canadian programming retransmitted in the U.S.

E. The Minimum Fees Should Be Isolated and Ignored for Purposes of Determining the Amount of Basic Awards, and the Copyright Office Should Then Distribute Such Fees as Part of the Basic Royalties

An additional changed circumstance, one that affects all claimant groups equally, is that a significant number of Form 3 cable systems did not carry any distant signals in 1998 and 1999. Approximately 20% of the total royalties paid by cable systems in 1998 and 1999 were derived from payments of the Minimum Fee. This is up from less than one half of one percent in 1997 and is directly attributable to the loss of WTBS and other superstations as distant signals. Unlike the money paid into the Basic, 3.75%, and Syndex funds, this money is not attributable to the carriage of a particular distant signal or the retransmission of a specific type of distant programming. Rather, it is a payment mandated by the Copyright Act to be paid by all large (Form 3) cable systems for the basic right to carry distant signals. When distant signals are carried, this fee is applied to the amount owed by the cable system for the distant signals actually carried. In the past, the Minimum Fees (along with fees paid by Form 1 and Form 2 cable systems) were distributed by the Copyright Office as part of and in accordance with the CRT or CARP Basic Funds award.[12]

Historically, the Minimum Fee has been a very small portion of the fund and its treatment has not affected the overall allocation of royalties. Presently, however, because the Minimum Fee fund is so large, its treatment must be addressed with greater care. The best method for handling the Minimum Fee is to recognize its impact on distant royalties so that Basic Royalties paid for the carriage of distant signals can be compared meaningfully to prior years. Apart from this, the Panel should ignore the Minimum Fee. There is no basis for allocating the Minimum Fees disproportionately to the Basic Fund and there is no basis for treating it as a slush fund, disproportionately rewarding some claimant groups at the expenses of others. After the awards are final, when it is appropriate to distribute the Minimum Fees, the Copyright Office's historical practice should be followed. That practice is to add the Minimum Fee—along with Form 3 fees paid for low power and Mexican signals and Form 1 and Form 2 fees—to the Basic Royalty fees and

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[12] See e.g., National Association of Broadcasters v. Librarian of Congress, 146 F. 3d 907, 914 (D.C. Cir. 1998) explaining the makeup of the three funds:

> The disputed royalties consist of "Basic Funds," 3.75% Funds" and "Syndex Funds," which in turn are subdivided into 1990 collections and 1991-1992 collections. The Basic Funds include all of the royalties collected from small- and medium-sized cable systems as well as the royalties collected from large cable systems for retransmission that were permitted under the now defunct, distant signal carriage rules of the Federal Communications Commission (FCC).

See also, 1990-1992 Proceeding, 61 Fed. Reg. at 55654 (identifying funds to be awarded).

distribute them to the claimant groups using the CARP's or CRT's awards for Basic Royalties.

Certainly, there is no basis for giving the CCG a disproportionately small amount of these fees. During cross-examination of David Bennett and through the Rebuttal Testimony of their witness Arthur Gruen, Program Suppliers made the argument that the CCG should be limited to Minimum Fees generated in the Canadian Compulsory Zone, rather than Minimum Fees generated throughout the country. Cable systems in the Canadian Compulsory Zone generate approximately 25% of the total royalties generated throughout the U.S. but generate approximately 30% of the Minimum Fee royalties. Royalty fees paid for Canadian signals represent approximately 3% of the fees paid throughout the U.S., but represent approximately 11-12% of the fees paid by systems within the Compulsory Zone. If the Panel were to restrict the CCG share of the Minimum Fees to those generated in the Compulsory Zone, it should be recognized that the CCG share of all distant fees is much higher as a proportion of distant Basic Royalties generated in the Compulsory Zone, and that the practical effect would be almost the same whether the Panel uses the smaller Canadian percentage of the larger national Minimum Fee pool or the larger Canadian percentage of the smaller Compulsory Zone Minimum Fee pool. Because of the administrative complexity of awarding the Canadians a larger share of the Minimum Fee from the Compulsory Zone, it makes more sense to simply give the Canadians their Basic Fee share of the Minimum Fees. (Prop. Find. § II.C.3 and Appendix A.)

F. The Royalties Paid for the Distant Carriage of Canadian Signals Should Be Allocated Only to Those Claimants Eligible to Receive Such Royalties: the CCG, the JSC and the Program Suppliers

Notwithstanding the lack of clarity in the 1990-1992 CARP's report, it is difficult to escape the conclusion that the Panel used the CCG's methodology. After asserting that the Bortz data was unreliable as to Canadian programming, the 1990-1992 CARP went on to state: "The other quantitative evidence we have is the fees generated. While there is a great deal of criticism, particularly by PTV, concerning acceptance of the fee-generated method, we see no other significant evidence to dispute the claim of the Canadians." 1990-1992 Proceeding, 61 Fed. Reg. at 55666. The Panel further explained that "while we tried to distance ourselves from the fee generated method [sic] . . . we certainly used that method in reaching our conclusion." (*Id.* at 55667.)

In the prior proceeding, the CCG sought 1.1% of Basic Royalties and the CARP awarded the CCG 1.0% (before adjustments for various settlements). Part of the reason the prior CARP did not give the CCG its full 1.1% was due to its perception that the increase from 0.75% to 1.0% already represented a sufficient one-third increase in the CCG award. (*Id.* at 55667.) It is important to note that during in the 1990-1992 proceeding, the Cable Copyright Royalty Fund was continuing to grow, so the overall increase was substantial (albeit not as large in real dollars as those experienced by other parties).

In this proceeding, the CCG methodology remains the most accurate and legally well-grounded method of determining an award for the CCG. The CCG believes that the royalties paid for Canadian signals are the best starting point for determining an award to the CCG. The next step in making an award is to determine (among the claimants eligible to participate in those royalties) the relative value of the programming on those signals. That can be done using the Canadian Survey sponsored by Dr. Ringold in conjunction with the Canadian Content Data sponsored by David Bennett.

The model provided on rebuttal by James Trautman for integrating the Canadian methodology with the allocation of royalties paid for American signals is quite useful. Appendices B through E (attached hereto and incorporated by reference) use this methodology to show how Basic and 3.75% royalties can be allocated using the Canadian methodology in conjunction with the Bortz data. The Appendices take Trautman's model further by accounting for an award to the Music Claimants and accounting for the Devotional Claimant and NPR settlements in the correct order to ensure that the terms of the settlements are met. The steps and assumptions are described in further detail below, using Appendix B (allocating the 1998 Basic Royalties) as an example:

Step 1, Allocation of Canadian Fees: In this step, the Basic Royalties paid for the carriage of Canadian distant signals are allocated according to the results of the Canadian Survey (average results over four years) and the Canadian Content Data. For Canadian valuation, the two numbers are averaged together. For JSC and Program Suppliers, the

Canadian Survey numbers are reduced pro rata.[13] Full-year royalties are used and the percentages are based on the combined survey results. The shares are shown to five digits of precision to accommodate the precision used in the Devotional Claimant Settlement. (*See* Trautman Reb. at 4-5 and Trautman's appendix B.)

Step 2, Removal of Devotional and Canadian Shares from Bortz Cable Operator Survey Results: This step follows the process illustrated by Mr. Trautman except that it backs out the Devotional Claimants' share because that party has settled. The example uses the Bortz survey results (though the Nielsen results or some other composite or adjusted results could just as easily have been used). Unlike Trautman's example, PTV is not removed except in the case of the 3.75 Rate Royalties. The purpose of this step is to ensure that the four claimant groups, JSC, PTV, Program Suppliers and NAB, have shares that—relative to the four groups only—equal 100%. Note that the CCG does not benefit from the reallocation of the Devotional or PTV share of the Bortz results. The exact procedure used to adjust the shares in this step (and subsequent steps) is the same procedure used by Mr. Trautman, i.e., dividing each share by the sum of the shares. (*See* Trautman Reb. at 4-5 and Trautman's appendix B.)

Step 3, Distribution of Royalties by Share: This step further follows Mr. Trautman's process, allocating the royalties by share. The royalties used are full-year Basic Royalties paid for U.S. signals and exclude all Minimum Fees. (*See* Trautman Reb. at 4-5 and Trautman's appendix B; Appendix A.)

Step 4, Combination of U.S. and Canadian Royalties: In this step, the royalties are combined and the shares for the five claimant groups are determined. (Trautman Reb. at 4-5 and Trautman's appendix B.)

Step 5, Incorporation of Music Claimants' Award: Starting with this step, the model builds on the Trautman model to deal with the other claimant groups. Here, the shares are adjusted to recognize an award to the Music Claimants of 2.33% of the royalties from all the non-settling parties. (Prop. Find. § II.G.)

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[13] The pro rata adjustment is done by multiplying the Canadian Survey result for JSC or Program Suppliers by the ratio of the sum of those two shares to the percentage remaining to be allocated after adjusting the CCG share.

Step 6, Incorporation of Devotional Claimant Settlement: In this step, the shares are adjusted to recognize that the Devotional Claimants get a set amount of all Basic Royalties (excluding those royalties paid to NPR pursuant to settlement). (*See* Devotional Settlement; NPR Settlement.)

Step 7, Incorporation of NPR Settlement: This step adjusts the share of all claimant groups to adjust for the settlement with NPR which comes off the top of all royalty funds. The result of this step is the final award for the CCG. This step also produces the accurate final allocation for the Devotional Claimants and NPR. If the Panel used this model, the results of Step 7 would yield the final distribution to all parties. (*See* NPR Settlement.)

IV. CONCLUSION

During 1998 and 1999, approximately 3.3% and 3.6%, respectively, of all Basic cable royalties and 0.25% and 0.63%, respectively, of all 3.75% fee royalties were paid specifically for the carriage of Canadian stations in order to compensate the "creators of the works retransmitted" on those stations. Only parties whose works were retransmitted on the stations are eligible to receive the royalties paid for those stations.

Applying the basic principals behind the Copyright Act's compulsory licensing scheme and the concept of changed circumstances, CCG members are entitled to no less than 70% of these royalties. Remaining royalties should be specifically awarded to the Joint Sports Claimants and to Program Suppliers in the manner set forth in Appendices B through E.

The CCG asks the Panel to consider its claim carefully and provide its members with an award that reflects the value of Canadian programming to those cable operators who paid for such programming.

Respectfully submitted,

Dated: August 20, 2003

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A

APPENDIX A
DISTANT ROYALTY FEE BREAKDOWN
(Based on CDC Data shown in EXHIBIT CDN-R-1-E and EXHIBIT CDN 4-B)

SIGNAL TYPE	DISTANT FEES Fees as allocated by CDC to "distant" carriage including Base, 3.75%, Syndex and some Minimum Fee (but excluding Minimum Fees allocated to "local" by CDC)		ALL FEES EXCEPT MINIMUM FEES Base, 3.75%, and Syndex fees as allocated by CDC but excluding all of the Minimum Fee		BASE FEES Excludes all of the Minimum Fee		3.75% FEES		SYNDEX FEES	
	Dollars	Percentage of Total	Dollars	Percentage of Total	Dollars	Percentage of Total	Dollars	Percentage of Total	Dollars	Percentage of Total
1998-1										
Canadian	$ 1,160,429	2.95%	$ 1,160,429	3.05%	$ 1,137,931	3.43%	$9,532	0.19%	$12,966	29.22%
Educational	$ 1,932,223	4.92%	$ 1,250,433	3.28%	$ 1,250,433	3.77%	$0	0.00%	$0	0.00%
Indep. US	$ 32,538,969	82.77%	$ 32,531,762	85.42%	$ 28,590,158	86.27%	$3,924,968	80.15%	$16,636	37.50%
Low Power	$ 35,366	0.09%	$ 35,366	0.09%	$ 35,366	0.11%	$0	0.00%	$0	0.00%
Mexican	$ 17,692	0.05%	$ 17,692	0.05%	$ 17,692	0.05%	$0	0.00%	$0	0.00%
Network	$ 3,626,461	9.23%	$ 3,086,993	8.11%	$ 2,109,673	6.37%	$962,554	19.66%	$14,766	33.28%
Total	$ 39,311,140	100%	$ 38,082,675	100%	$ 33,141,253	100.00%	$ 4,897,054	100.00%	$ 44,368	100.00%
1998-2										
Canadian	$ 1,122,303	2.80%	$ 1,122,303	2.87%	$ 1,092,786	3.19%	$15,007	0.31%	$14,510	32.30%
Educational	$ 1,895,387	4.74%	$ 1,337,503	3.42%	$ 1,329,988	3.88%	$7,515	0.16%	$0	0.00%
Indep. US	$ 33,564,348	83.85%	$ 33,561,446	85.91%	$ 29,723,360	86.79%	$3,821,366	80.03%	$16,720	37.22%
Low Power	$ 24,793	0.06%	$ 24,793	0.06%	$ 24,793	0.07%	$0	0.00%	$0	0.00%
Mexican	$ 24,528	0.06%	$ 24,528	0.06%	$ 24,528	0.07%	$0	0.00%	$0	0.00%
Network	$ 3,396,241	8.48%	$ 2,995,658	7.67%	$ 2,051,106	5.99%	$930,855	19.50%	$13,697	30.49%
Total	$ 40,027,600	100%	$ 39,066,231	100%	$ 34,246,561	100.00%	$ 4,774,743	100.00%	$ 44,927	100.00%
1998 Total										
Canadian	$ 2,282,732	2.88%	$ 2,282,732	2.96%	$ 2,230,717	3.31%	$ 24,539	0.25%	$ 27,476	30.77%
Educational	$ 3,827,610	4.82%	$ 2,587,936	3.35%	$ 2,580,421	3.83%	$ 7,515	0.08%	$ -	0.00%
Indep. US	$ 66,103,317	83.32%	$ 66,093,208	85.67%	$ 58,313,518	86.53%	$ 7,746,334	80.09%	$ 33,356	37.35%
Low Power	$ 60,159	0.08%	$ 60,159	0.08%	$ 60,159	0.09%	$ -	0.00%	$ -	0.00%
Mexican	$ 42,220	0.05%	$ 42,220	0.05%	$ 42,220	0.06%	$ -	0.00%	$ -	0.00%
Network	$ 7,022,702	8.85%	$ 6,082,651	7.88%	$ 4,160,779	6.17%	$ 1,893,409	19.58%	$ 28,463	31.88%
Total	$ 79,338,740	100.00%	$ 77,148,906	100.00%	$ 67,387,814	100.00%	$ 9,671,797	100.00%	$ 89,295	100.00%

APPENDIX A
DISTANT ROYALTY FEE BREAKDOWN
(Based on CDC Data shown in EXHIBIT CDN-R-1-E and EXHIBIT CDN 4-B)

SIGNAL TYPE	DISTANT FEES Fees as allocated by CDC to "distant" carriage including Base, 3.75%, Syndex and some Minimum Fee (but excluding Minimum Fees allocated to "local" by CDC)		ALL FEES EXCEPT MINIMUM FEES Base, 3.75%, and Syndex fees as allocated by CDC but excluding all of the Minimum Fee		BASE FEES Excludes all of the Minimum Fee		3.75% FEES		SYNDEX FEES	
	Dollars	Percentag e of Total	Dollars	Percentage of Total	Dollars	Percentage of Total	Dollars	Percentage of Total	Dollars	Percentage of Total
1999-1										
Canadian	$ 1,289,424	3.10%	$ 1,289,424	3.18%	$ 1,259,893	3.53%	$29,531	0.60%	$0	0.00%
Educational	$ 1,992,729	4.80%	$ 1,379,184	3.40%	$ 1,370,395	3.84%	$8,789	0.18%	$0	0.00%
Indep. US	$ 34,684,381	83.48%	$ 34,683,568	85.45%	$ 30,771,705	86.32%	$3,895,365	79.40%	$16,498	53.34%
Low Power	$ 86,636	0.21%	$ 86,636	0.21%	$ 86,636	0.24%	$0	0.00%	$0	0.00%
Mexican	$ 21,998	0.05%	$ 21,998	0.05%	$ 21,998	0.06%	$0	0.00%	$0	0.00%
Network	$ 3,473,086	8.36%	$ 3,126,251	7.70%	$ 2,139,362	6.00%	$972,459	19.82%	$14,430	46.66%
Total	$ 41,548,254	100%	$ 40,587,061	100%	$ 35,649,989	100.00%	$ 4,906,144	100.00%	$ 30,928	100.00%
1999-2										
Canadian	$ 1,385,943	3.31%	$ 1,385,943	3.39%	$ 1,325,435	3.75%	$36,024	0.65%	$24,484	50.34%
Educational	$ 1,987,231	4.74%	$ 1,401,169	3.43%	$ 1,401,169	3.97%	$0	0.00%	$0	0.00%
Indep. US	$ 34,781,806	82.99%	$ 34,781,568	85.11%	$ 30,362,375	85.97%	$4,409,157	80.13%	$10,036	20.64%
Low Power	$ 71,954	0.17%	$ 71,954	0.18%	$ 71,954	0.20%	$0	0.00%	$0	0.00%
Mexican	$ 19,045	0.05%	$ 19,045	0.05%	$ 19,045	0.05%	$0	0.00%	$0	0.00%
Network	$ 3,664,312	8.74%	$ 3,209,304	7.85%	$ 2,137,671	6.05%	$1,057,519	19.22%	$14,114	29.02%
Total	$ 41,910,291	100%	$ 40,868,983	100%	$ 35,317,649	100.00%	$ 5,502,700	100.00%	$ 48,634	100.00%
1999 Total										
Canadian	$ 2,675,367	3.21%	$ 2,675,367	3.28%	$ 2,585,328	3.64%	$ 65,555	0.63%	$ 24,484	30.77%
Educational	$ 3,979,960	4.77%	$ 2,780,353	3.41%	$ 2,771,564	3.91%	$ 8,789	0.08%	$ -	0.00%
Indep. US	$ 69,466,187	83.23%	$ 69,465,136	85.28%	$ 61,134,080	86.14%	$ 8,304,522	79.78%	$ 26,534	33.35%
Low Power	$ 158,590	0.19%	$ 158,590	0.19%	$ 158,590	0.22%	$ -	0.00%	$ -	0.00%
Mexican	$ 41,043	0.05%	$ 41,043	0.05%	$ 41,043	0.06%	$ -	0.00%	$ -	0.00%
Network	$ 7,137,398	8.55%	$ 6,335,555	7.78%	$ 4,277,033	6.03%	$ 2,029,978	19.50%	$ 28,544	35.88%
Total	$ 83,458,545	100.00%	$ 81,456,044	100.00%	$ 70,967,638	100.00%	$ 10,408,844	100.00%	$ 79,562	100.00%

B

APPENDIX B
CANADIAN AWARD CALCULATION FOR 1998 BASIC ROYALTIES

Determination of Shares on Canadian Signals

Canadian Subcategory	Canadian Survey Shares	Canadian Content Share (Avg. Fee-Weighted)	Shares after Combination of Data
Canadian Programming	61.00000%	80.16500%	70.58250%
JSC Programming	27.00000%		20.36596%
US Series & Movies	12.00000%		9.05154%
Total	100.00000%		100.00000%

Step 1 (Allocation of Canadian Fees)

Canadian Subcategory	Canadian Basic Royalty Fees	Shares after Combination of Canadian Survey and Weighted Canadian Content	Royalty Amounts (Fees * Shares)
Canadian Programming	$ 2,230,717	70.58250%	$ 1,574,496
JSC Programming	$ 2,230,717	20.36596%	$ 454,307
US Series & Movies	$ 2,230,717	9.05154%	$ 201,914

Step 2 (Removal of Devotional and Canadian Shares from Bortz Cable Operator Survey Results)

Category	Share	Removal of Devotional and Canadian Share	Adjusted Share
Live Sports	37.0	37.0	39.19492%
Movies	21.9	21.9	23.19915%
Syndicated Series	17.8	17.8	18.85593%
News & Public Affairs	14.8	14.8	15.67797%
Devotional	5.3		
Non-Commercial (PTV)	2.9	2.9	3.07203%
Canadian	0.4		
Total	100.1	94.4	100.00000%

Step 3 (Distribution of US Royalties by Share)

Category	All US Basic Fees from Form 3 Systems Excluding Minimum Fee	Adjusted Shares From Step 2	Royalty Amounts (Fees * Share)
JSC	$ 65,157,097	39.19492%	$ 25,538,269
Program Suppliers*	$ 65,157,097	42.05508%	$ 27,401,872
NAB	$ 65,157,097	15.67797%	$ 10,215,308
PTV	$ 65,157,097	3.07203%	$ 2,001,648

* The Program Suppliers category combines the Bortz numbers from Movies & Syn. Series

APPENDIX B
CANADIAN AWARD CALCULATION FOR 1998 BASIC ROYALTIES

Step 4 (Combination of US and Canadian Royalties)

Category	Royalty Amounts from Step 3	Royalty Amounts from Step 1	Total Royalties	Claimant Shares
JSC	$ 25,538,269	$ 454,307	$ 25,992,576	38.57163%
Program Suppliers	$ 27,401,872	$ 201,914	$ 27,603,787	40.96258%
NAB	$ 10,215,308	$ 0	$ 10,215,308	15.15898%
PTV	$ 2,001,648	$ 0	$ 2,001,648	2.97034%
Canadian	$ 0	$ 1,574,496	$ 1,574,496	2.33647%
Total	$ 65,157,097	$ 2,230,717	$ 67,387,814	100.00000%

Step 5 (Incorporation of Music Claimants Award)

Category	Claimant Shares from Step 4	Adjusted Shares including Music
JSC	38.57163%	37.67291%
Program Suppliers	40.96258%	40.00815%
NAB	15.15898%	14.80578%
PTV	2.97034%	2.90113%
Canadian	2.33647%	2.28203%
Music		2.33000%
Total	100.00000%	100.00000%

Step 6 (Incorporation of Devotional Claimants Settlement)

Category	Adjusted Shares from Step 5	Adjusted Shares including Devotional Claimants
JSC	37.67291%	37.22319%
Program Suppliers	40.00815%	39.53055%
NAB	14.80578%	14.62904%
PTV	2.90113%	2.86650%
Canadian	2.28203%	2.25479%
Music	2.33000%	2.30219%
Devotional		1.19375%
Total	100.00000%	100.00000%

Step 7 (Incorporation of NPR Settlement)

Category	Adjusted Shares from Step 6	**Final Share of 1998 Basic Royalties for All Phase I Claimant Groups**
JSC	37.22319%	37.15619%
Program Suppliers	39.53055%	39.45940%
NAB	14.62904%	14.60270%
PTV	2.86650%	2.86134%
Canadian	2.25479%	2.25073%
Music	2.30219%	2.29804%
Devotional	1.19375%	1.19160%
NPR		0.18000%
Total	100.00000%	100.00000%

C

APPENDIX C
CANADIAN AWARD CALCULATION FOR 1998 3.75 RATE ROYALTIES

Step 1 (Allocation of Canadian Fees)

Canadian Subcategory	Canadian 3.75 Rate Fees	Shares after Combination of Canadian Survey and Weighted Canadian Content	Royalty Amounts (Fees * Shares)
Canadian Programming	$ 24,539	70.58250%	$ 17,320
JSC Programming	$ 24,539	20.36596%	$ 4,998
US Series & Movies	$ 24,539	9.05154%	$ 2,221

Step 2 (Removal of Devotional, PTV, and Canadian Shares from Bortz Cable Operator Survey Results)

Category	Share	Removal of Devotional, PTV and Canadian Share	Adjusted Share
Live Sports	37.0	37.0	40.43716%
Movies	21.9	21.9	23.93443%
Syndicated Series	17.8	17.8	19.45355%
News & Public Affairs	14.8	14.8	16.17486%
Devotional	5.3		
Non-Commercial (PTV)	2.9		
Canadian	0.4		
Total	100.1	91.5	100.00000%

Step 3 (Distribution of US Royalties by Share)

Category	All US 3.75 Rate Fees from Form 3 Systems Excluding Minimum Fee	Adjusted Shares From Step 2	Royalty Amounts (Fees * Share)
JSC	$ 9,647,258	40.43716%	$ 3,901,077
Program Suppliers*	$ 9,647,258	43.38798%	$ 4,185,750
NAB	$ 9,647,258	16.17486%	$ 1,560,431
PTV	$ 9,647,258	0.00000%	$ 0

* The Program Suppliers category combines the Bortz numbers from Movies & Syn. Series

Step 4 (Combination of US and Canadian Royalties)

Category	Royalty Amounts from Step 3	Royalty Amounts from Step 1	Total Royalties	Claimant Shares
JSC	$ 3,901,077	$ 4,998	$ 3,906,075	40.38623%
Program Suppliers	$ 4,185,750	$ 2,221	$ 4,187,971	43.30086%
NAB	$ 1,560,431	$ 0	$ 1,560,431	16.13382%
PTV	$ 0	$ 0	$ 0	0.00000%
Canadian	$ 0	$ 17,320	$ 17,320	0.17908%
Total	$ 9,647,258	$ 24,539	$ 9,671,797	100.00000%

APPENDIX C
CANADIAN AWARD CALCULATION FOR 1998 3.75 RATE ROYALTIES

Step 5 (Incorporation of Music Claimants Award)

Category	Claimant Shares from Step 4	Adjusted Shares including Music
JSC	40.38623%	39.44524%
Program Suppliers	43.30086%	42.29195%
NAB	16.13382%	15.75791%
PTV	0.00000%	0.00000%
Canadian	0.17908%	0.17491%
Music		2.33000%
Total	100.00000%	100.00000%

Step 6 (Incorporation of Devotional Claimants Settlement)

Category	Adjusted Shares from Step 5	Adjusted Shares including Devotional Claimants
JSC	39.44524%	39.08737%
Program Suppliers	42.29195%	41.90826%
NAB	15.75791%	15.61494%
PTV	0.00000%	0.00000%
Canadian	0.17491%	0.17332%
Music	2.33000%	2.30886%
Devotional		0.90725%
Total	100.00000%	100.00000%

Step 7 (Incorporation of NPR Settlement)

Category	Adjusted Shares from Step 6	**Final Share of 1998 3.75 Rate Royalties for All Phase I Claimant Groups**
JSC	39.08737%	39.01701%
Program Suppliers	41.90826%	41.83282%
NAB	15.61494%	15.58684%
PTV	0.00000%	0.00000%
Canadian	0.17332%	0.17301%
Music	2.30886%	2.30471%
Devotional	0.90725%	0.90562%
NPR		0.18000%
Total	100.00000%	100.00000%

D

APPENDIX D
CANADIAN AWARD CALCULATION FOR 1999 BASIC ROYALTIES

Step 1 (Allocation of Canadian Fees)

Canadian Subcategory	Canadian Basic Royalty Fees	Shares after Combination of Canadian Survey and Weighted Canadian Content	Royalty Amounts (Fees * Shares)
Canadian Programming	$ 2,585,328	70.58250%	$ 1,824,789
JSC Programming	$ 2,585,328	20.36596%	$ 526,527
US Series & Movies	$ 2,585,328	9.05154%	$ 234,012

Step 2 (Removal of Devotional and Canadian Shares from Bortz Cable Operator Survey Results)

Category	Share	Removal of Devotional and Canadian Share	Adjusted Share
Live Sports	38.8	37.0	39.19492%
Movies	22.0	21.9	23.19915%
Syndicated Series	15.8	17.8	18.85593%
News & Public Affairs	14.7	14.8	15.67797%
Devotional	5.7		
Non-Commercial (PTV)	2.9	2.9	3.07203%
Canadian	0.2		
Total	100.1	94.4	100.00000%

Step 3 (Distribution of US Royalties by Share)

Category	All US Basic Fees from Form 3 Systems Excluding Minimum Fee	Adjusted Shares From Step 2	Royalty Amounts (Fees * Share)
JSC	$ 68,382,310	39.19492%	$ 26,802,388
Program Suppliers*	$ 68,382,310	42.05508%	$ 28,758,238
NAB	$ 68,382,310	15.67797%	$ 10,720,955
PTV	$ 68,382,310	3.07203%	$ 2,100,728

* The Program Suppliers category combines the Bortz numbers from Movies & Syn. Series

Step 4 (Combination of US and Canadian Royalties)

Category	Royalty Amounts from Step 3	Royalty Amounts from Step 1	Total Royalties	Claimant Shares
JSC	$ 26,802,388	$ 526,527	$ 27,328,915	38.50898%
Program Suppliers	$ 28,758,238	$ 234,012	$ 28,992,250	40.85278%
NAB	$ 10,720,955	$ 0	$ 10,720,955	15.10682%
PTV	$ 2,100,728	$ 0	$ 2,100,728	2.96012%
Canadian	$ 0	$ 1,824,789	$ 1,824,789	2.57130%
Total	$ 68,382,310	$ 2,585,328	$ 70,967,638	100.00000%

APPENDIX D
CANADIAN AWARD CALCULATION FOR 1999 BASIC ROYALTIES

Step 5 (Incorporation of Music Claimants Award)

Category	Claimant Shares from Step 4	Adjusted Shares including Music
JSC	38.50898%	37.61172%
Program Suppliers	40.85278%	39.90091%
NAB	15.10682%	14.75483%
PTV	2.96012%	2.89115%
Canadian	2.57130%	2.51139%
Music		2.33000%
Total	100.00000%	100.00000%

Step 6 (Incorporation of Devotional Claimants Settlement)

Category	Adjusted Shares from Step 5	Adjusted Shares including Devotional Claimants
JSC	37.61172%	37.16273%
Program Suppliers	39.90091%	39.42459%
NAB	14.75483%	14.57870%
PTV	2.89115%	2.85664%
Canadian	2.51139%	2.48141%
Music	2.33000%	2.30219%
Devotional		1.19375%
Total	100.00000%	100.00000%

Step 7 (Incorporation of NPR Settlement)

Category	Adjusted Shares from Step 6	**Final Share of 1998 Basic Royalties for All Phase I Claimant Groups**
JSC	37.16273%	37.09584%
Program Suppliers	39.42459%	39.35363%
NAB	14.57870%	14.55246%
PTV	2.85664%	2.85149%
Canadian	2.48141%	2.47694%
Music	2.30219%	2.29804%
Devotional	1.19375%	1.19160%
NPR		0.18000%
Total	100.00000%	100.00000%

E

APPENDIX E
CANADIAN AWARD CALCULATION FOR 1999 3.75 RATE ROYALTIES

Step 1 (Allocation of Canadian Fees)

Canadian Subcategory	Canadian 3.75 Rate Fees	Shares after Combination of Canadian Survey and Weighted Canadian Content	Royalty Amounts (Fees * Shares)
Canadian Programming	$ 65,555	70.58250%	$ 46,270
JSC Programming	$ 65,555	20.36596%	$ 13,351
US Series & Movies	$ 65,555	9.05154%	$ 5,934

Step 2 (Removal of Devotional, PTV, and Canadian Shares from Bortz Cable Operator Survey Results)

Category	Share	Removal of Devotional, PTV and Canadian Share	Adjusted Share
Live Sports	37.0	37.0	40.43716%
Movies	21.9	21.9	23.93443%
Syndicated Series	17.8	17.8	19.45355%
News & Public Affairs	14.8	14.8	16.17486%
Devotional	5.3		
Non-Commercial (PTV)	2.9		
Canadian	0.4		
Total	100.1	91.5	100.00000%

Step 3 (Distribution of US Royalties by Share)

Category	All US 3.75 Rate Fees from Form 3 Systems Excluding Minimum Fee	Adjusted Shares From Step 2	Royalty Amounts (Fees * Share)
JSC	$ 10,343,289	40.43716%	$ 4,182,532
Program Suppliers*	$ 10,343,289	43.38798%	$ 4,487,744
NAB	$ 10,343,289	16.17486%	$ 1,673,013
PTV	$ 10,343,289	0.00000%	$ 0

* The Program Suppliers category combines the Bortz numbers from Movies & Syn. Series

Step 4 (Combination of US and Canadian Royalties)

Category	Royalty Amounts from Step 3	Royalty Amounts from Step 1	Total Royalties	Claimant Shares
JSC	$ 4,182,532	$ 13,351	$ 4,195,883	40.31075%
Program Suppliers	$ 4,487,744	$ 5,934	$ 4,493,678	43.17173%
NAB	$ 1,673,013	$ 0	$ 1,673,013	16.07299%
PTV	$ 0	$ 0	$ 0	0.00000%
Canadian	$ 0	$ 46,270	$ 46,270	0.44453%
Total	$ 10,343,289	$ 65,555	$ 10,408,844	100.00000%

APPENDIX E
CANADIAN AWARD CALCULATION FOR 1999 3.75 RATE ROYALTIES

Step 5 (Incorporation of Music Claimants Award)

Category	Claimant Shares from Step 4	Adjusted Shares including Music
JSC	40.31075%	39.37151%
Program Suppliers	43.17173%	42.16583%
NAB	16.07299%	15.69849%
PTV	0.00000%	0.00000%
Canadian	0.44453%	0.43417%
Music		2.33000%
Total	100.00000%	100.00000%

Step 6 (Incorporation of Devotional Claimants Settlement)

Category	Adjusted Shares from Step 5	Adjusted Shares including Devotional Claimants
JSC	39.37151%	39.01431%
Program Suppliers	42.16583%	41.78328%
NAB	15.69849%	15.55607%
PTV	0.00000%	0.00000%
Canadian	0.43417%	0.43023%
Music	2.33000%	2.30886%
Devotional		0.90725%
Total	100.00000%	100.00000%

Step 7 (Incorporation of NPR Settlement)

Category	Adjusted Shares from Step 6	**Final Share of 1998 3.75 Rate Royalties for All Phase I Claimant Groups**
JSC	39.01431%	38.94409%
Program Suppliers	41.78328%	41.70807%
NAB	15.55607%	15.52807%
PTV	0.00000%	0.00000%
Canadian	0.43023%	0.42946%
Music	2.30886%	2.30471%
Devotional	0.90725%	0.90562%
NPR		0.18000%
Total	100.00000%	100.00000%

CERTIFICATE OF SERVICE

I, Kendall Satterfield, hereby certify as of August 20, 2003, that a true and correct copy of the foregoing documents were sent by hand-delivery or Federal Express to the persons on the service list below:

L. Kendall Satterfield

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August 20, 2003

By Hand Delivery

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ORIGINAL

Re: Distribution of 1998-1999 Cable Royalty Funds
Docket No. 2001-8 CARP CD 98-99

Dear Ms. Grimes:

Enclosed please find an original and 4 copies of the Canadian Claimant Group's Proposed Findings of Fact and Conclusion of Law. Also please find a CD containing a Word 97 version of the Proposed Findings and an Excel file containing Appendices A-E of the Proposed Findings.

Please do not hesitate to call if you have any questions about this document.

Sincerely,

L. Kendall Satterfield

Enclosures

cc All Counsel